APPENDIX A

In the United States Court of Claims

No. 357–64 (Decided May 12, 1967)

RICHARD G. AUGENBLICK

v.

THE UNITED STATES

Before COWEN, *Chief Judge,* LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, *Judges.*

ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

DAVIS, *Judge,* delivered the opinion of the court:

Our plaintiff is a career Navy commander, most recently on duty with the Department of Defense, who was dismissed from the service, with total forfeitures, by order of a Navy court-martial. Claiming that the conviction violated certain of his constitutional rights, he sues for back-pay and asks us to hold his dismissal invalid. The charge against him was sodomy with an enlisted airman, in violation of Article 125 of the Uniform Code of Military Justice, but the conviction was for the lesser included offense of committing an indecent, lewd, and lascivious act (under Article 134). The only sentence was dismissal and forfeiture of pay. Both sides have moved for summary judgment on the basis of the record in the military proceedings. We take the facts underlying the conviction as they were given by the Navy Board of Review in affirming the court-martial. Our problem concerns, not the

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weight or substantiality of the evidence, but alleged procedural defects said to constitute an invasion of the protection against double jeopardy and a denial of due process.

On January 11, 1961, Commander Augenblick, after having attended an office party where he had drinks of scotch with little water, proceeded to his home in Arlington, Virginia. Not feeling like turning in, he changed to civilian dress and went to a bar and an officers' club in Virginia before going to Washington where he also visited a bar. At each stop he had some beer. Becoming extremely tired and desiring a cup of coffee before returning home to Arlington, he entered a "White Tower" restaurant. While at the restaurant, he met Airman Hodges who was waiting for a bus which would return him to his base in nearby Maryland. It is not clear from the record who initiated the conversation, but it resulted in the accused's and the airman's taking a ride in the former's automobile. After driving about fifteen minutes, the accused parked the automobile in the vicinity of the West Potomac Basin in the District of Columbia, near the Potomac River, where they were apprehended by two Metropolitan Police Officers, taken to the Third Precinct, charged with disorderly conduct, and delivered over to military police.

The accused testified in his own behalf that he was driving toward the Fourteenth Street Bridge (over the Potomac River from the District of Columbia to Virginia); that he was very, very sleepy and felt that it was unsafe to drive and therefore stopped in the area mentioned and went to sleep; that the next thing he remembers is the glow from the flashlight of one of the arresting officers. Airman Hodges, who was in full military uniform at the time of the arrest, testified for the prosecution that Augenblick first in-

formed him that he had his uncle's car and that they could go to his uncle's home for some rest; that refusing this offer, the airman went for a ride with the hope of being returned to his base. Hodges stated that, upon parking the automobile, the accused first reclined against his door; after a few minutes, he asked whether he could lay his head in Hodges' lap and after certain preliminaries the accused performed an act of oral sodomy. The arresting police officers testified that they noted the accused's head disappear from the driver's side of the vehicle and upon inspection found his face very close to the exposed privates of the airman. The court-martial found Augenbilck not guilty of sodomy but guilty of committing an indecent lewd, and lascivious act by willfuly and knowingly placing his head in Hodges's lap with his face in close proximity to the latter's exposed privates.

The sentence of dismissal and forfeiture was approved by the convening authority, and the Board of Review (with one of its three members dissenting) affirmed. The Court of Military Appeals denied petitioner's request for review, and the Secretary of the Navy declined further review under Article 71 of the Uniform Code.

In this court plaintiff's claim is bottomed on two constitutional arguments. First, he asserts that his right not to be twice put in jeopardy was violated when his first court-martial was terminated and he was subsequently tried and convicted by a second court-martial. Second, he insists that rulings of the law officer at the trial and of the Board of Review, concerning the production of evidence relating to Hodges' early-morning interrogation at the Naval Weapons Plant in Washington, abridged his right to due process.

I

Here, as in prior back-pay cases involving court-martial proceedings, the defendant tells us that we have no jurisdiction to scrutinize the conviction. Rejecting a similar claim, we recently said that "our opinions have consistently stated or assumed that denial of significant constitutional rights would render the military conviction invalid, and permit this court to award back-pay." *Shaw* v. *United States,* 174 Ct. Cl. 899, 904, 357 F. 2d 949, 953 (1966). It is argued that this position disregards Article 76 of the Uniform Code (and its predecessor, Article 50(h) of the 1948 Articles of War) providing that court-martial determinations "are final and conclusive" and "are binding upon all departments, *courts,* agencies, and officers of the United States * * *" (emphasis added).[1] The legislative history demonstrates conclusively that this section, despite the breadth of its wording, was not intended to do away with review by habeas corpus (S. Rep. No. 486, 81st Cong., 1st Sess. 32 (1949); H.R. Rep. No. 491, 81st Cong., 1st Sess. 35 (1949)), and the Supreme Court has twice

[1] Article 76, 10 U.S.C. § 876 (1964), reads:

"*Finality of proceedings, findings, and sentences.* The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 of this title (article 74) and the authority of the President."

held that military "finality" provisions of this type do not cut off review by habeas corpus. *Gusik* v. *Schilder*, 340 U.S. 128, 132–33 (1950); *Burns* v. *Wilson*, 346 U.S. 137, 142 (1953) (opinion of Chief Justice Vinson).[2] Defendant takes strictly and literally this specific reference to habeas corpus and denies that any other type of collateral review is available. But it seems clear that habeas corpus was mentioned because it is the primary mode of relief for confined prisoners, who historically form the bulk of those attacking court-martial convictions. For persons like plaintiff who are not in jail, habeas corpus is no remedy at all, and other avenues have long been open to redress their wrongs. In *Gusik* v. *Schilder*, *supra*, 340 U.S. at 133 n. 3, the Court observed that "collateral attack of a judgment of a court-martial was early entertained", expressly citing civil actions for trespass, replevin, and assault, battery, and false imprisonment. During at least the past eighty years this court has entertained suits by military personnel claiming that their court-martial convictions were void. See, *e.g.*, *Runkle* v. *United States*, 122 U.S. 543 (1887); *Fletcher* v. *United States*, 26 Ct. Cl. 541 (1891), *rev'd on the merits*, 148 U.S. 84 (1893); *Swaim* v. *United States*, 28 Ct. Cl. 173, 217 (1893), *aff'd*, 165 U.S. 553 (1897). This form of collateral review was long ago established firmly—although in

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[2] There have been comparable Supreme Court rulings with respect to broad "finality" statutes in the selective service field (*Estep* v. *United States*, 327 U.S. 114, 119, 121–125 (1946)) as well as in immigration cases (*Heikkila* v. *Barber*, 345 U.S. 229, 233–35 (1953); *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955); *Brownell* v. *Tom We Shung*, 352 U.S. 180 (1956)). See also *Wellman* v. *Whittier*, 259 F. 2d 163 (C.A.D.C. 1958) and *Thompson* v. *Gleason*, 317 F. 2d 901 (C.A.D.C. 1962) (interpreting 38 U.S.C. § 211(a), making final certain determinations of the Administrator of Veterans Affairs).

the earlier days, of course, "jurisdiction" was interpreted narrowly. As the concept of "jurisdiction" has expanded (see, *e.g.*, *Johnston* v. *Zerbst*, 304 U.S. 458 (1938)), this court has naturally kept pace. See *Shaw* v. *United States*, *supra*, 174 Ct. Cl. at 903–06, 357 F. 2d at 953–54. The wider power of review has only been exercised for the last generation. There has, however, been an unbroken continuity, going back to the 19th century, in the position that a void court-martial conviction can be attacked through a suit for back-pay in this court. In one of his opinions in *Burns* v. *Wilson*, 346 U.S. 137, 844, 847–48 (1953), Mr. Justice Frankfurter referred to the broadened concept of "jurisdiction" reflected in a series of then-recent court-martial cases in the Court of Claims with the significant observation, "where of course collateral attack is by way of a petition for back pay resting on allegations that the assailed court-martial proceedings were void."

There is no adequate reason for looking to habeas corpus alone, or for thinking that Congress limited its exception from "finality" to that specific proceeding. Liberty is of course important, but so are a man's career,[3] his livelihood, his rights as a veteran, his status as a convicted criminal, and his reputation. To deny collateral attack to one not in confinement—the consequence of saying that habeas corpus is the only remedy—would be to deny the possibility of review by a constitutional court, and ultimately by the Supreme Court, of the constitutional claims of servicemen like plaintiff who have not been sentenced to jail or who have been released. See *Gallagher* v. *Quinn*, 363 F. 2d 301, 303–04 (C.A.D.C. 1966), *cert. denied*,

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[3] Plaintiff had served over 18 years in the Navy at the time of his conviction, with combat service in World War II and the Korean episode, and important duty assignments; he had been selected for promotion to captain.

385 U.S. 881. On these grounds, the District of Columbia Circuit recently upheld, in *Gallagher*, the right to seek a mandatory injunction and declaratory relief testing a court-martial conviction, and the First Circuit has sustained an action in the nature of mandamus to the same effect. *Ashe* v. *McNamara*, 355 F. 2d 277 (C.A. 1, 1965).[4] Within the last three years we have taken the same road in *Hooper* v. *United States*, 164 Ct. Cl. 151, 326 F. 2d 982 (1964), *cert. denied*, 377 U.S. 977, and in *Shaw* v. *United States*, *supra* (as well as in earlier decisions).

Defendant points out that here, unlike *Shaw* (see 174 Ct. Cl. at 905–06, 357 F. 2d at 954), the Court of Military Appeals could have reviewed the case, though it chose not to do so. On the pure question of this court's power to consider the "jurisdiction" of the court-martial, we do not think this makes any difference. The "finality" provision of the Uniform Code, as we have pointed out, does not make the military appellate court truly final. Appropriate review by Article III courts has continued. In *Hooper* v. *United States*, *supra*, the Court of Military Appeals had taken the plaintiff's case and passed upon the same issue presented to this court. In *Gallagher* v. *Quinn*, *supra*, as in the present case, the Court of Military Appeals denied the petition for review. In several habeas corpus cases the Supreme Court has considered issues which have been passed upon by the military court. *Reid* v. *Covert*, 354 U.S. 1 (1957); *Kinsella* v. *Singleton*, 361 U.S. 234 (1960); *McElroy*

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[4] The other day the District of Columbia Circuit entertained a declaratory judgment suit by an individual who had been convicted and fined by a court of the civil administration of Okinawa, from which no direct appeal can be taken to any Article III court. *Eiko Uehara Rose* v. *McNamara*, C.A.D.C. No. 20323, decided March 23, 1967.

v. *Guagliardo*, 361 U.S. 281 (1960). These cases involved court-martial "jurisdiction" in the more traditional sense, but once it is admitted that this court (or a district court) still has power to consider that kind of "jurisdiction"—even after the establishment of the Court of Military Appeals—we do not see how it can be said that the civil court's *power* is restricted to old-fashioned "jurisdiction" and cannot extend to "jurisdiction" in the more modern sense of *Johnston* v. *Zerbst*, *supra*. It may well be that, where the Court of Military Appeals has actually passed upon factual issues, a civil court should not reweigh the evidence at all. But lesser deference may be thought due where the Court of Military Appeals, as here, has merely denied a petition for review, thus exercising the certiorari-type authority granted it by Article 67(b)(3) of the Uniform Code.[5] *Cf. Fay* v. *Noia*, 372 U.S. 391, 435–38 (1963). In any event, the existence of the Court of Military Appeals does not preclude consideration by this court of constitutional issues other than those calling for a reassessment of particular evidence or particular circumstances. See *Shaw* v. *United States*, *supra*, 174 Ct. Cl. at 905, 357 F. 2d at 954.

It is for that reason that we cannot accept, in this case, the Government's further point that, since plaintiff was accorded consideration within the military system of the constitutional objections he now advances, this court should not reconsider those objections for itself. As will appear in our discussion of

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[5] In the decisions in which we have referred to a denial of a petition for review by the Court of Military Appeals, we have also found, ourselves, no reason to think there was a jurisdictional defect (*Moses* v. *United States*, 137 Ct. Cl. 374, 379–80 (1957); *Begallee* v. *United States*, 148 Ct. Cl. 397, 402–03, 286 F. 2d 606, 609–10 (1960); *cert. denied*, 364 U.S. 865).

the merits (Parts II—V, *infra*), there is no occasion now (as there was not in *Shaw*) to consider whether or not the admonitions of *Burns* v. *Wilson*, 346 U.S. 137 (1953), have retained their full force since the recent developments in the law of federal review of state criminal convictions (*e.g.*, *Townsend* v. *Sain*, 372 U.S. 293 (1963)). To dispose of this case we need not reevaluate for ourselves evidence which the military has itself evaluated under a proper legal standard. We need not reexamine or reweigh pure issues of fact. The errors we find mount to a constitutional defect which grows directly from, and is entwined with, erroneous legal rulings by the law officer and the Board of Review. In that respect the requirement of *Burns* v. *Wilson*, *supra*, 346 U.S. at 142, 144, for full and fair consideration of the case by the military has not been fulfilled for this plaintiff.

II

The claim of double jeopardy rises from these facts:—Under court-martial procedures, if a witness is not available for examination during the required pre-trial investigation (under Article 32) it is prejudicial error for the investigating officer to consider his unsworn statements. Failure to follow this procedure could subject subsequent findings by a court-martial to reversal on appeal. *United States* v. *Samuels*, 27 C.M.R. 280, 287 (1959). At plaintiff's pre-trial investigation, written documents purporting to be sworn statements of the two arresting police officers were introduced in the absence of those civilian officials who had refused to testify unless subpoenaed. Agent Mendelson, a civilian employee of the Office of Naval Intelligence (who took the statements), testified at the investigation that the statements had been sworn to (and therefore that the jurats were correct). The ac-

cused objected to the officers' evidence, claiming that he should have been permitted to confront and examine them. The investigating officer ruled otherwise, and on the basis of the allegedly sworn statements and the testimony of Airman Hodges recommended that Commander Augenblick be brought to trial before a general court-martial. At the first trial, the defense counsel renewed the objection to the appearance of the police officers and moved that the charge and specification be dismissed on the ground that their pre-trial statements had not been shown to be sworn, as required by the Code. During an interview with defense counsel and at an out-of-court hearing, one police officer categorically stated that he had not sworn to his written statement. Mendelson testified that he was not certain but felt that he had taken the officer's oath. Confronted with this conflicting testimony, the law officer, presiding at the trial, interpreted the defense motion to dismiss as one for appropriate relief and granted it. He also considered it within the province of the convening authority to determine what disposition should be made of this matter and what action should be taken on the charge and specification. The convening authority withdrew the charge and specification from the first court and initiated a Court of Inquiry which heard sworn testimony, including that of the police officers, and recommended a second court-martial. This second trial, before a new court, is said to have violated plaintiff's constitutional right to be free of double jeopardy.

The Fifth Amendment "does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment." *Wade* v. *Hunter,* 336 U.S. 684, 688 (1949); *Gori* v. *United States,* 367 U.S. 364, 368 (1961). Aware that unforeseeable circumstances

may arise during a trial making its completion impossible, the Supreme Court has long applied the rule, first formulated in *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824), that "a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice." *Wade* v. *Hunter, supra*, 336 U.S. at 690. *Perez* and its progeny, instead of establishing a "rigid formula" capable of mechanical application, direct the courts to pay heed to all circumstances and to accept "the sound discretion of a presiding judge * * * as to the necessity of discontinuing a trial." *Id.* at 691, 692. This same standard applies, in general, to courts-martial. *Wade* v. *Hunter, supra; United States* v. *Stringer*, 17 C.M.R. 122, 132–33 (1954).

In this case, the law officer was confronted—when it was learned that the policeman had not in fact sworn to his pre-trial statement—with potential procedural error of sufficient gravity to vitiate an ultimate finding of guilty. *Cf. United States* v. *Schilling*, 22 C.M.R. 272, 274 (1957). The steps taken by him and the convening authority to cure this serious defect were well within the bounds of sound judgment. An error in the pre-trial investigation might possibly be cured by testimony received at the trial. See, *e.g., United States* v. *Everett*, 16 C.M.R. 676 (1953). That was, however, not the only route. The course chosen was quite appropriate since the observations in the policeman's pre-trial statement had contributed to the investigating officer's recommendation that a court-martial be convened. In those circumstances it was important to determine if sufficient evidence existed, apart from the questionable statement, to bring the accused to trial. One method of obtaining this evidence would be to convene a Court of Inquiry which would

have the authority (which the Article 32 pre-trial investigation lacked) to subpoena witnesses, including the policemen, hear testimony, and recommend any additional judicial proceedings.[6]

Our conclusion is supported by the significant fact that in the first court-martial proceeding the accused apparently sought the very remedy provided by the convening authority—the establishment of a Court of Inquiry. In military procedure, a motion to dismiss is often treated as a motion for appropriate relief. See *United States* v. *Samuels, supra; United States* v. *Nichols,* 23 C.M.R. 343, 348 (1957); *United States* v. *Everett, supra.* Here, defense counsel did not object to the law officer's ruling converting the motion to dismiss into one for appropriate relief. On the contrary, counsel, by motions and argument, indicated that they sought the opportunity to interrograte the policeman at a Court of Inquiry, and pointedly declared that "very definitely we would ask for a court of inquiry."[7]

[6] We agree with the statement of the Board of Review that, "There were other means at the disposal of the law officer and the convening authority to clarify this issue and remedy the defect but we do not believe it is for us to be a 'Monday morning quarterback' in this particular instance since we see nothing here that would lead us to believe that the action taken by the law officer and the convening authority was for any purpose other than to cure a defect and assure the parties a fair and impartial trial."

[7] The record of the pre-trial investigation and the first court-martial reflects counsel's insistence. At the outset of the first Article 32 pre-trial investgiation, the defense objected to proceeding in the absence of the two police officers who would not appear unless subpoenaed. Defense counsel stated, "There is a procedure in existence for securing their presence." During the first trial, counsel renewed this objection and moved that the charge and specification be dismissed, stating in part:

"Those policemen were readily available by processes of the Navy with which the Legal Officer was completely aware,

The plaintiff cannot insist upon specific redress before the court-martial and then complain because it was granted. See *United States* v. *Ivory,* 26 C.M.R. 296 (1958); *Leigh* v. *United States,* 329 F. 2d 883, 884 (C.A.D.C. 1964).

Nor is there adequate reason to believe that the convening authority terminated the proceedings and ordered the Court of Inquiry with the intention of obtaining the accused's conviction by a second court-martial after it had become evident that the first would acquit. The Board of Review (which was unanimous on the double jeopardy issue) found that evidence very damaging to the accused had already been received by the first court through Hodges' testimony. That trial, when terminated, was not going badly for the prosecution. See *Gori* v. *United States, supra,* 367 U.S. at 369. Indeed, there is evidence that the president and members of the first court-martial were "irritated" by the "administrative delays"

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namely that a Court of Inquiry, which would have subpoena power, could be employed * * *."

In further argument on the motion for dismissal, the defense counsel stated:

"I believe and I submit to the law officer, that I don't think I could have made it any clearer right at the every outset that we've not only objected, but without using the words 'Court of Inquiry' as such, which I say again, I don't think was necessary; the Investigating Officer, the Commander, the Legal Officer, he knew what I meant without using the touch stone, Court of Inquiry, but we were told that this is the proceedings, this is the way we are going to proceed and that's it."

Finally, in response to the law officer's question at the trial whether the defense desired a further pre-trial investigation or a Court of Inquiry to be held to correct the alleged defects in the pre-trial investigation, the defense stated:

"Yes, sir. * * * The answer to the law officer's question is that very definitely we would ask for a court of inquiry. That was what we had meant by implication at the very beginning, sir."

(caused by the lengthy out-of-court hearings), and that the accused's counsel was concerned with the possibility that these irritations might affect the court's judgment adversely to the accused. If such prejudice were established, dismissal of the charge and specification and granting of a retrial would be the required procedure. *Wade* v. *Hunter, supra,* 336 U.S. at 689. This possibility could be taken into account in confirming the decision to terminate on other grounds.

The course taken by the law officer and the convening authority was an effort to assure the accused a fair and impartial trial. Confronted with serious procedural error and aware of the expressed desire of accused's counsel, the officials chose to end the first court-martial, convene a Court of Inquiry, and proceed to trial anew. There was no taint of an attempt to prejudice the accused. In the circumstances, we agree with the Board of Review that these measures did not violate the double jeopardy provision of the Constitution.

III

The second of plaintiff's bases for invalidating his conviction and dismissal is that rulings of the law officer (at the second court-martial) and of the Board of Review violated the Jencks Act, 18 U.S.C. § 3500, and that in this case those errors rose to a deprivation of due process.

The challenged rulings involve the early-morning interrogation of Airman Hodges immediately after the arrest. At the civilian police station, both the commander and the airman denied that "anything" had happened. After being turned over to the Armed Services Police, they were brought to the headquarters of the Potomac River Naval Command at the Naval Weapons Plant in Washington for interrogation. It was then about three o'clock in the morning of Jan-

uary 12, 1961. The airman and the accused were questioned separately in a room designed for the monitoring and recording of conversation. Agent Connor of the Office of Special Investigation of the Air Force (OSI) interrogated Hodges, while Agent Mendelson, the civilian employee of the Office of Naval Intelligence (ONI), observed, asked some questions, and took notes. After twenty to twenty-five minutes Connor accompanied the twenty-year old Hodges to the separate Air Force OSI headquarters in Maryland where Hodges swore to a five-page written statement describing the evening's events. After the Hodges session at the naval station, Mendelson interrogated the accused for about two hours. During both interviews at the naval station, Agent James, the duty officer at that post, was in the adjacent room. He testified unequivocally that he had made tape recordings of both sessions—one reel of the Hodges and two reels of the Augenblick interrogation.

At the second court-martial, Hodges' testimony touched on his interrogation at the Naval Weapons Plant. After trial counsel's direct examination, the defense moved, pursuant to the Jencks Act, for production of the tape recording transcribed by Agent James and for the handwritten notes taken by Agent Mendelson during the interrogation. The law officer ordered either that the tape-recording be produced or that the Government produce witnesses at an out-of-court hearing who "can explain" its non-existence if the tape were not available, but refused to order production of Mendelson's notes.[8] The Government did not produce the Hodges tape-recording, but called as witnesses each of the intelligence officers who had

[8] The prosecution had proffered Hodges' written statement made later at Air Force headquarters, but the defense had declined the offer.

contact with the recording, except Agent Mendelson who was in Norfolk at the time of the second trial in Washington. The upshot of the testimony was that, though James testified that he had made the tape, no one then had it or had heard it or knew what had happened to it. The defense urged the calling of Mendelson, but the law officer, after reading the record of Mendelson's testimony on the tape-recording at a pre-trial investigation, refused to have him called as a witness and concluded that no sanction should be imposed on the prosecution for failing to produce the recording. The Board of Review (with a dissent on this point) affirmed, holding, among other things, that "It was the responsibility of counsel for defendants, [sic] to pursue ascertainment of correctness of the Government's claim that the tape recording which was demanded for production is no longer in existence, and for no reprehensible reason chargeable to the Government."

A. We discuss first the application of the Jencks Act to the tape-recording, then to the handwritten notes (Part IV, *infra*), and finally, in Part V, *infra*, whether the circumstances here raise the statutory violations to the constitutional level. The Act provides that, after a Government witness has testified on direct examination, at a criminal trial, "the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." 18 U.S.C. §3500(b). Paragraph (d) declares:

> If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike

> from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

The Hodges tape-recording would plainly qualify as a productible statement under paragraph (e).* There is no doubt, moreover, that the Jencks Act governed plaintiff's trial. See *United States* v. *Combs*, 28 C.M.R. 866 (1959); *United States* v. *Heinel*, 26 C.M.R. 39 (1958). The rights protected by both the Supreme Court's *Jencks* decision, 353 U.S. 657 (1957), and the congressional Act are considered by the military as "a basic protection to which an accused is entitled." Kent, "The Jencks Case: The Viewpoint of a Military Lawyer," 45 A.B.A.J. 819 (1959), citing Dep't of Army Pamphlet 145–1 at p. 37. In this case, the Government has accepted the applicability of the Jencks Act to proceedings of military tribunals and has confined its argument to denying any statutory violation or invasion of constitutional rights.

Three other undisputed postulates of the Act's application may also be stated at the outset. First, a "statement" need not be within the physical control of the prosecution to be "in the possession of the United States." It is sufficient that an investigating Government official has possession. The original *Jencks* deci-

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* 18 U.S.C. § 3500(e) provides:

"The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

sion, *supra*, 353 U.S. at 659, 673, as well as the majority of its offspring, have involved the production of reports from the files of the FBI. *Cf. Harvey Alum. (Inc.)* v. *NLRB*, 335 F. 2d 749, 753–54 (C.A. 9, 1964) (statements held by government agency other than the one conducting a hearing producible under Jencks Act at the hearing). Even in non-Jencks Act evidence-suppression cases, the activities of investigating officials are generally attributeed to the prosecution. See *Barbee* v. *Warden*, 331 F. 2d 842, 846 (C.A. 4, 1964); *Curran* v. *State of Delaware*, 154 F. Supp. 27, 31 (D. Del. 1957, *aff'd*, 259 F. 2d 707 (C.A. 3, 1958), *cert. denied*, 358 U.S. 948 (1959). Possession of the tape recording by a Government official such as an ONI or OSI intelligence officer would thus fall within the statutory requirement. Equally evident, destruction of a statement, in certain circumstances, would be the equivalent of non-production under section 3500(d). *Campbell* v. *United States*, 365 U.S. 85, 98 (1961); *Killian* v. *United States*, 368 U.S. 231, 242 (1961). Restricting "possession" to physical control at the time of trial would "permit evasion and emasculation of the Jencks Act to the point of total ineffectiveness." *United States* v. *Lonardo*, 350 F. 2d 523, 530 (C.A. 6, 1965). Third, the test to determine in what circumstances a Government official may destroy a Jencks Act "statement" without violating the statute turns on the good-faith and reasonable nature of the destruction. For instance, an FBI agent takes notes of an interview with a Government witness, and, after transferring the information in the notes to a formal report, destroys the former. Assuming the notes to be a statement, the Supreme Court has indicated that the critical inquiry would be whether the statement was "destroyed by the agents in good faith and in accord with their normal practice * * *." *Killian* v. *United*

States, supra, 368 U.S. at 242.[10] The federal courts have carefully examined the particular facts of each case in reaching this judgment. See *United States* v. *Jones,* 360 F. 2d 92, 95 (C.A. 2, 1966), *cert. denied,* 385 U.S. 1012 (1967); *United States* v. *Greco,* 298 F. 2d 247, 250 (C.A. 2, 1962), *cert. denied,* 369 U.S. 820, and the other cases cited *infra.*

B. A crucial and contested issue in this case is whether the Government must demonstrate compliance with the good-faith test or whether the accused must show noncompliance (*i.e.,* bad faith or willful destruction). This issue has rarely been discussed directly but we think that the cases indicate that the responsibility rests predominantly on the Government to prove that an unavailable statement was destroyed or misplaced in good faith, once the accused has made a showing that there is a sufficient basis for inquiry.[11]

At plaintiff's trial there was clearly enough of a showing to call for a further inquiry into the then existence of the Hodges tape-recording—the pre-trial testimony of Agent James that he had made such a tape would be sufficient in itself, and there were other troubling circumstances. The law officer obviously felt that plaintiff had borne any burden of coming forward; he ordered an out-of-court inquiry. Once that stage was reached, the standard advanced by the Supreme Court in *Killian, supra*—whether the statement was "destroyed by the agents in good faith and in

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[10] In *Campbell* v. *United States, supra,* 365 U.S. at 98, the Court left open the further question whether mere negligent destruction (or even non-negligent good-faith destruction) would be enough to invoke the Act's sanctions against the Government. See footnote 14, *infra.*

[11] On the accused's burden of going forward, see *United States* v. *Comulada,* 340 F. 2d 449, 451 (C.A. 2, 1965), *cert. denied,* 380 U.S. 978; *Alexander* v. *United States,* 336 F. 2d 910, 911–12 (C.A.D.C., 1964), *cert. denied,* 379 U.S. 935.

accord with their normal practice.' * * *"—suggests that the Government must convince the judge of these facts. The references in *Campbell* v. *United States*, *supra*, 365 U.S. at 95, to a Jencks Act inquiry not being "an adversary proceeding in the nature of a trial controlled by rules governing the allocation between the parties of the burdens of proof or persuasion" was not intended to remove from the Government the risk of failing to persuade that it acted in good faith; rather, the Court was cautioning against imposing such burdens on the accused.

The federal courts seem to have applied the rule in this fashion. In *Ogden* v. *United States*, 303 F. 2d 724, 737–38 (C.A. 9, 1962), the court stated that during a Jencks Act inquiry the judge should consider evidence bearing on the issues "if the statement was destroyed in accordance with normal practice before the prosecution of defendant was completed, for a sufficient reason wholly unrelated to the prosecution, in good faith and with no intention to suppress evidence," and these facts are "peculiarly within the knowledge of the government, and it was improper to impose the burden of a more precise demonstration upon the defendant." See also *United States* v. *Hilbrich*, 232 F. Supp. 111, 115, 130 (N.D. Ill. 1964), *aff'd* 341 F. 2d 555 (C.A. 7, 1965), *cert. denied*, 381 U.S. 941 (Government introduced evidence to show that statement destroyed in accordance with FBI procedures, good business and office practice. In judging the Government's good faith, the most important evidence "is the testimony of the witness who caused the destruction—his character and his apparent motives."); *United States* v. *Crosby*, 294 F. 2d 928, 950–51 (C.A. 2, 1961), *cert. denied sub nom. Mittelman* v. *United States*, 368 U.S. 984 (1962) (finding of good-faith destruction made after Government

prosecutors who had destroyed certain notes testified); *United States* v. *Tomaiolo*, 317 F. 2d 324, 327–28 (C.A. 2, 1963), *cert. denied*, 375 U.S. 856 (finding of good-faith destruction made after Government showed that notes were destroyed prior to the passage of the Jencks Act and the identical information was available by other Government-furnished statements); *United States* v. *Thomas*, 282 F. 2d 191, 193–94 (C.A. 2, 1960) (good-faith destruction found after detailed explanation of government procedure regarding the preparation of written reports from destroyed notes); *United States* v. *Lonardo, supra*, 350 F. 2d at 529–30, 535 (Government unable to demonstrate good-faith destruction; statutory sanctions invoked although the defense apparently had not affirmatively shown any governmental intention to suppress information).[12] When a demonstration of good-faith behavior is affirmatively made by the Government, the accused would be called upon to rebut this evidence if he wished to prevail. See *United States* v. *Greco, supra*, 298 F. 2d at 250.

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[12] Chief Judge Woodbury of the First Circuit has stated, while not affirmatively holding, what might possibly be interpreted as a contrary rule. On a petition for rehearing in the *Campbell* case, it was said that the Jencks Act imposes "no duty, at least in the absence of bad faith, to keep any statements that might have been taken. Therefore, there being no evidence from which it could possibly be found that Toomey [the Government agent] destroyed his notes in bad faith, the question propounded by this petition * * * is academic." *Campbell* v. *United States*, 303 F. 2d 747, 751 (1962). We think that this statement only places the burden on the accused, to show official bad faith, after the Government has proffered evidence demonstrating that the "destruction was in entire good faith." This is consistent with both the concurring judge's interpretation of the court's denial, *id.* at 752, and the court's earlier disposition of the same case. 296 F. 2d 527, 534 (1961).

Placing the burden on the Government is just and appropriate. "[T]he ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." *Campbell* v. *United States, supra,* 365 U.S. at 96; *United States* v. *New York, N.H. & H. R.R.,* 355 U.S. 253, 256 n. 5. On the other hand, to put this burden on the Government would not cause unfairness or hardship. *Tot* v. *United States,* 319 U.S. 463, 469–70 (1943); *Shaw* v. *United States, supra,* 174 Ct. Cl. at 916, 357 F. 2d at 960–61. Facts bearing on the issue, such as the agents' conduct, office operating procedure, the existence of other evidence which might provide the accused with the informaiton contained in the missing statement, are all "peculiarly within the knowledge of the government * * *." *Ogden* v. *United States, supra,* 303 F. 2d at 737.

We hold, therefore, that the Board of Review erred as a matter of law in ruling that "it was the responsibility of counsel for defendants, [sic] to pursue ascertainment of correctness of the Government's claim that the tape recording which was demanded for production is no longer in existence, and for no reprehensible reason chargeable to the Government." [13]

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[13] The Board majority also indicated by its phrasing that it was putting the burden on the accused when it said, in the paragraph immediately preceding the portion quoted above in the text, "nor is there any evidence of destruction or bad faith, or deliberate refusal to produce, as suggested by appellant in his supplemental brief," and "All of the wtinesses were under oath and we cannot without substantial evidence to the contrary, hold that there was a deliberate refusal to deliver the tape or that these government employees were guilty of gross negligence of a degree requiring corrective action on our part." If the tape was improperly destroyed, Mendelson probably did it, but the Board merely says there was no evidence to that

That holding improperly placed the burden of persuasion on the accused.

C. This erroneous ruling directly infected, in our view, the Board's affirmance of the law officer's refusal to order Agent Mendelson called to testify at the production hearing held during the second trial. The law officer reasoned that Mendelson need not be called since he had testified during a pre-trial investigation (the "Peltzer investigation"), the defense had an opportunity to cross-examine him at that time, and Mendelson was then in Norfolk and a trip to Washington would have caused delay. The law officer read the relevant portions of the "Peltzer investigation" transcript and concluded that further testimony by Mendelson would not shed additional light on the disposition of the missing recording.

We know, of course, that evidentiary rulings are generally within the province of the trier and a judge or law officer's judgment should not be altered unless it is clearly erroneous. *Palermo* v. *United States,* 360 U.S. 343, 353 (1959). But the main basis for this rule, that the trial judge has had the opportunity to weigh the credibility of live testimony presented before him, is absent in this case—the fact that Mendelson did not appear before the law officer is the critical point. See *United States* v. *Aviles,* 337 F. 2d 552, 556 (C.A. 2, 1964). Moreover, this rule cannot and has not deterred courts from reviewing and reversing decisions which contravene substantial rights. See *Jencks v. United States, supra,* 353 U.S. 657; *Campbell* v. *United States,* 373 U.S. 487 (1963). We think that such an error is present here.

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effect. That position reverses the burden. The Government should have been required to prove that Mendelson did not destroy the record.

In Jencks Act matters the judge (and the law officer at a court-martial) has a special responsibility, and is not merely a passive arbiter of the parties' contentions. The Supreme Court stated in *Campbell I, supra,* that the judge's duty at a hearing is "affirmatively to administer the statute in such way as can best secure relevant and available evidence * * *." 365 U.S. at 95. The hearing is not a strictly adversary proceeding. The Court indicated, for example, that the trial judge might be required to call a witness on his own motion or require the Government to produce a witness to clarify uncertainties. The aim is to insure that the judicial officer is able to obtain sufficient information to determine whether the conditions of the Jencks Act have been fulfilled. See *Saunders* v. *United States,* 316 F. 2d 346, 349 (C.A.D.C., 1963); *Hillard* v. *United States,* 317 F. 2d 150, 151, (C.A.D.C., 1963); *Ogden* v. *United States,* 323 F. 2d 818, 821 (C.A. 9, 1963), *cert. denied,* 376 U.S. 973 (1964).

In the light of the judicial officer's special responsibility, the mere reading of Agent Mendelson's prior testimony cannot, in the circumstances of this case, be accepted as sufficient. The cold print of a transcript is not as revealing as the opportunity to see, hear, and question a witness, and thus better judge his credibility. The law officer's inquiry was limited to the issues raised and the responses given at another investigation. He was denied the opportunity to raise new questions, press additional contentions, or reflect upon the witness' behavior or demeanor. Such advantages of oral testimony over the reading of a transcript caused the First Circuit to send a Jencks Act case back to the trial judge, ordering him to take oral testimony of a key government agent. *Campbell* v. *United States, supra,* 296 F. 2d at 534. See also, *Campbell* v. *United States, supra,* 365 U.S. at 96;

Campbell v. *United States, supra,* 373 U.S. at 493. In the present instance, the witness' (Mendelson's) credibility was of obvious importance. It had already been placed in question by Mendelson's testimony that he had taken a sworn statement, with a jurat affixed, from Police Officer Round (one of two civilian policemen who had made the arrest); Round denied under oath that he ever swore to the statement; and the subsequent testimony of both policemen was "somewhat weaker" than their purportedly sworn statements.

In addition, Mendelson's testimony during the "Peltzer investigation" was far from informative on the two issues of importance at the out-of-court hearing during the second court-martial. First, when asked whether Hodges' interrogation had been recorded, the agent replied, "I'm not certain that we had any recording." Second, regarding the whereabouts of a tape if one had been made, he said: "I don't recall receiving a tape with Hodges' recording on it." He also offered the explanation that if he had received such a tape, "when the statement from Hodges came in, the tape was reused for another investigation."

Other testimony received during the pre-trial investigations and at the out-of-court hearing in the second court-martial clarified several issues and also raised serious questions regarding Mendelson's answers. Agent James unequivocably stated that he had made a recording (one reel) of the Hodges interrogation and had delivered that reel, with two others of Commander Augenblick's interrogation, to Agent Fason, Mendelson's superior. Mendelson's answer on the making of a tape was thus flatly contradicted by the person most likely to know. The helpfulness of Mendelson's initial statements on the disposition of the recording was also placed in grave doubt. Fason had originally

testified that he had not received the reels from James. After Mendelson's appearance at the "Peltzer investigation", however, Fason altered his testimony and remembered receiving boxes of tapes from James and physically handing the boxes (with a rubber band around them) to Mendelson on January 12, 1961. This change of testimony, after Mendelson's testimony, might have reawakened thoughts in Mendelson if he had been called again. Furthermore, testimony received after the "Peltzer inquiry" from other ONI agents revealed that, in June or July, when Mendelson was transferred to Norfolk, he delivered four boxes of tapes (without a rubber band) to Agent Carroll, who testified that Mendelson had stated "they were the tapes of Commander Augenblick's * * * interrogation." The four boxes were subsequently placed in storage. It thus became more apparent that, while the Hodges tape was in Mendelson's control (as it apparently was), it disappeared since it was not among the four tapes handed to Agent Carroll. It is also evident that two extraneous tapes, not pertinent at all to the Augenblick investigation, were added to the two reels of the accused's interrogation.

Next, during the out-of-court hearing at the second court-martial, it was known that the Hodges tape could not have been reused pursuant to normal ONI procedures. These procedures place the responsibility on the officer in charge of the case (Mendelson) and his superior (Fason), jointly, to decide whether a tape should be reused. But Mendelson, himself, had testified earlier that he did not recall advising Fason that the tape was no longer needed; and Fason said that, after transferring the tapes to Mendelson, he had nothing further to do with them. It would have abridged normal ONI operating practice to have erased the tape, knowing that it might be needed as

evidence at a future court-martial. Lastly, Agent James revealed that, even if a tape were erased, the number which he initially affixed to the reel (and also entered in his recording log) would not have been removed. Therefore, even if the Hodges recording had been erased, the ONI still should have produced, and been able to produce, the properly numbered reel.

Each of these points raised new and important areas of investigation which could have been pursued if Mendelson had been called as a witness at the out-of-court inquiry during the second court-martial. It was evident, we stress, from his earlier testimony that Mendelson was not a witness whose prior statements could be accepted at face value. Other testimony indicated, also, that he was best positioned to inform the court of the disposition of the tape-recording. It had been directly traced into his hands by the evidence of James and Fason. As the agent who apparently had physical control of the tape during the period in which it disappeared, his testimony was very important to the Government in meeting its burden of good-faith destruction or loss. See *United States* v. *Annunziato,* 293 F. 2d 373, 381 (C.A. 2, 1961), *cert. denied,* 368 U.S. 919; *Alexander* v. *United States,* 336 F. 2d 910, 912 (C.A.D.C. 1964), *cert. denied,* 379 U.S. 935; *United States* v. *Hilbrich, supra,* 232 F. Supp. at 130.[14] We must therefore agree

[14] One military tribunal appears to have held the prosecution to perhaps an even more stringent standard of conduct than the civilian courts. In *United States* v. *Combs*, 28 C.M.R. 866 (1959), Government negligence, rather than "'conscious' destruction", resulted in the loss of a Jencks Act statement requested by defense counsel. The Air Force Board of Review held that "we cannot allow the intent of that law [Jencks statute] to be circumvented by such negligence." Acknowledging that both the *Jencks* decision and statute "were aimed at

Footnote continued on following page.

with the dissenting member of the Board of Review that failure to recall Mendelson for testimony bearing on these most important issues was error which substantially prejudiced the accused's rights.

IV

The plaintiff also argues that the law officer erred in not making an *in camera* examination of Mendelson's handwritten notes of the Hodges early-morning interrogation at the Naval Weapons Plant. Under the Jencks statute, the Government is required to produce only those written statements of a witness which are a "substantially verbatim recital" of the witness' oral statement. See footnote 9, *supra*. For the notes to qualify as a statement, the court must ask whether they "could fairly be deemed to reflect fully and without distortion what had been said to the government agent." "[O]nly those statements which could properly be called the witness' own words should be made available to the defense for purposes of impeachment." *Palermo* v. *United States, supra,* 360 U.S. at 352–53.

When an accused seeks production of a paper said to be a "statement", the trial judge, or law officer at a court-martial, must once again exercise his affirmative duty in discharging his responsibilities under the Act. *Campbell* v. *United States, supra,* 365 U.S. at 95.

Footnote continued from previous page.

preserving and perfecting the accused's rights to cross examination of prosecution witnesses on the basis of certain prior statements * * *", the Board imposed a duty upon the Government to preserve any statements until, at least, after it has been determined whether their production will be required at trial. *Id.* at 873. In *Campbell I, supra,* 365 U.S. at 98, the Supreme Court left open the question of destruction or loss which was in good faith but merely negligent.

The entire Court in *Campbell* recognized this duty when "the legal significance of a document" is at issue. "Here the responsibility for resolving the issue rests with the court, and it is the court that must pursue appropriate means for ascertaining the facts relevant to judgment." *Id.* at 107. The primary obligation is placed upon the court.

The "appropriate means" can vary with each case. Documents "clearly beyond the reach of the statute" perhaps need not be produced. "However, when it is doubtful whether the production of a particular statement is compelled by the statute," the Government, at a minimum, must submit the statement to the trial judge for an *in camera* determination. *Palermo* v. *United States, supra,* 360 U.S. at 354. Often, the circumstances require a *voir dire* inquiry at which the judge takes testimony and hears argument of counsel relating to the statement. *Campbell* v. *United States, supra,* 365 U.S. at 92; *Palermo* v. *United States, supra,* 360 U.S. at 354-55.

While the decisions of other courts in other factual circumstances cannot serve as binding precedent to resolve the particular issue we have, it is relevant that the courts have been very reluctant to decide whether a document qualifies as a statement without, at least, holding an *in camera* examination of the document. *Palermo,* itself, concluded that an agent's notes, consisting of approximately 600 words, of a conference lasting three and one-half hours was not a Jencks Act "statement" only after the disputed notes were examined by the trial judge. See, *e.g., United States* v. *Keig,* 320 F. 2d 634, 637 (C.A. 7, 1963); *Karp* v. *United States,* 277 F. 2d 843, 849 (C.A. 8, 1960), *cert. denied,* 364 U.S. 842; *Williams* v. *United States,* 328 F. 2d 178, 180 (C.A.D.C., 1963); *Bary* v. *United States,* 292 F. 2d 53, 58 (C.A. 10, 1961). These and

companion decisions, to paraphrase Justice Frankfurter, seem to us to establish "a generally clear direction" that, where there is doubt, *in camera* inspection must be had. *Palmero* v. *United States, supra,* 360 U.S. at 353.[15]

The law officer and the Board of Review did not find that there was no doubt that Mendelson's handwritten notes were not producible; they simply determined, without looking at the notes, that for various reasons they must be considered non-producible. But in the absence of the notes it could not be said, without much doubt and hesitation, that they failed to qualify as a "statement." In denying the accused's motion for production of the notes, the law officer relied "particularly" on the fact that the agent used "navy terminology." Agent Mendelson's testimony at the "Peltzer investigation," however, reveals that such jargon was included in a typed memo report subsequently prepared, but apparently not in the notes. The law officer seems to have confused the notes with the typed memorandum subsequently prepared by the agent. Furthermore, the initial evidence concerning the notes was only Mendelson's comment that "I did jot down a couple of rough notes at the time." Subsequently, Mendelson informed the trial counsel that "he never had any" notes of the Hodges interrogation. Once again, Agent Mendelson's initial statement became engulfed in a shroud of mystery and

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[15] In only one decision which has come to our attention has a circuit court affirmed the trial judge's refusal to hold an *in camera* examination of a memorandum to determine its status under the Jencks Act. *Canaday* v. *United States*, 354 F. 2d 849, 859 (C.A. 8, 1966). That court stressed the Government agent's undisputed testimony that the memorandum was drafted from information contained in documents which were given to the defense, and that no prejudice resulted from the judge's action.

doubt, solely of his own creation. In addition, the Board of Review rested in part on its factually erroneous statement (twice repeated) that accused's counsel did not ask for the notes at the pre-trial proceedings.

In these circumstances, we think it was erroneous for the Board to affirm the law officer's failure to examine *in camera* Mendelson's notes of the Hodges interrogation so as to determine if they qualified as a "statement" and were producible under the Jencks Act. Such an *in camera* judicial examination would accord with the Act's purpose to regulate the defense's access to government papers. *Palermo* v. *United States, supra,* 360 U.S. at 354. The mere examination would not have delayed the trial or caused excessive inconvenience. *United States* v. *Comulada,* 340 F. 2d 449, 451 (C.A. 2, 1965), *cert. denied,* 380 U.S. 978. It would have assured, however, that the accused's right to important material was adequately safeguarded.[16]

For these reasons (Part III and IV, *supra*), we hold that the plaintiff's court-martial was tainted with two separate violations of the Jencks Act. In so ruling we are not reweighing and reexamining the evidence for ourselves (see *Burns* v. *Wilson, supra,* 346 U.S. at 144) but are determining that the law officer and the Board of Review committed serious legal errors—placing the burden of persuasion on the accused and otherwise misinterpreting the requirements of the Act—which deprived plaintiff of the "fair consideration" and the "full and fair hearing" which were his prerogatives (*id.* at 142, 144). The question remains whether these

[16] If the notes were not produced, the law officer could have inquired whether they had ever been made and, if so, had been improperly destroyed or lost. See *Campbell* v. *United States, supra,* 365 U.S. at 94, 98; *Ogden* v. *United States, supra,* 303 F. 2d at 733 (C.A. 9, 1962).

legal errors so prejudiced his trial that we should conclude that his constitutional right to due process has been violated.

V

Every violation of the protections afforded by the Jencks Act does not, in and of itself, amount *ipso facto* to a violation of the Due Process Clause. See *Scales* v. *United States*, 367 U.S. 203, 257-58 (1961). The Act's requirements, for instance, have not been applied as such to state criminal convictions. But we must explore the special circumstances of the case to determine if the statutory violations so fatally infected the court-martial proceedings against plaintiff that he was unconstitutionally deprived of a fair trial. That can surely be the result of significant procedural errors like these. The Supreme Court has indicated that the demands of the Due Process Clause must be carefully weighed when an accused in a criminal trial seeks evidence within the prosecution's control which is important to his defense. See *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963); *United States* v. *Reynolds*, 345 U.S. 1, 6 (1953); *United States ex rel Touhy* v. *Ragen*, 340 U.S. 462, 469 (1961). This constitutional inquiry is integral to our system under which the Government which prosecutes an accused also shares the responsibility of assuring that justice is done. *Jencks* v. *United States*, *supra*, 353 U.S. at 671.

The *Jencks* decision recognized that "justice requires" that a defendant at a criminal trial obtain prior statements of a witness which relate to his testimony. *Id.* at 669. Discussing the basis of the Court's decision, Mr. Justice Brennan has said: "It is true that our holding in *Jencks* was not put on constitutional grounds, for it did not have to be; but it would be idle to say that the commands of the Constitution were not close to the surface of the decision; indeed,

the Congress recognized its constitutional overtones in the debates on the [Jencks] statute." *Palermo* v. *United States, supra,* 360 U.S. at 362–63 (concurring opinion). A sponsor of the Jencks legislation explained, "The purpose of the bill is to protect the files of the Government against unwarranted disclosure and at the same time to preserve due process of law for defendants in criminal cases." 103 Cong. Rec. 16487 (Sen. O'Mahoney); *Clancy* v. *United States,* 365 U.S. 312, 315 (1961); *Campbell* v. *United States, supra,* 365 U.S. at 92. See also *Communist Party* v. *Subversive Activities Control Board,* 254 F. 2d 314, 327, 328 (C.A.D.C., 1958); 103 Cong. Rec. 15933–34, 15928, 16488–89, 16738 (1957).

A combination of factors leads us to conclude that, in this case, the Jencks Act violations were so weighty that they cumulated to the denial of a minimally fair trial. The first is that Hodges was the all-important prosecution witness. Without his testimony it seems unlikely that the court-martial would have convicted, even of the lesser offense. If the tape-recording had been improperly lost or destroyed, his entire testimony would have been stricken (under 18 U.S.C. § 3500(d) and the prosecution would have been left with little. Yet the evidence available to the law officer indicated a good chance that the tape, traced to Mendelson, had been improperly destroyed or lost by him. It was therefore critical to the trial that the tribunal go as far as could be to inquire into that possibility.

If the recording had been produced as a result of further examination of Mendelson, the information it contained could have been most revealing. Hodges was twenty years old and a low-ranking enlisted man. At first he denied that "anything happened." What he said thereafter at his first interrogation in the early morning at the Naval Weapons Plant, what questions

he answered, how he was interrogated, would clearly have a significant bearing on the reliability of the statement thereafter written up at Air Force headquarters and on the credibility of his testimony at the trial. The dissenting member of the Board of Review detailed the importance to the accused of this "initial interview of Hodges, a twenty year old, frightened enlisted man, being interviewed by two agents, with a third monitoring, in the early hours of the morning, especially since there are some indications in the record that at the very outset Hodges denied that 'anything' happened." Since Hodges during the trial apparently expected to receive an honorable discharge, and subsequent to the plaintiff's conviction was in fact honorably discharged from the Service, it was also very relevant for the accused to ascertain whether any inducement was offered or suggested, or other improper dealings had, during this first interrogation session.

Moreover, Hodges must have been a very dubious witness. His veracity was obviously questioned by the members of the court-martial. Of the prosecution's three principal witnesses, only Hodges testified that the accused had committed an act of oral sodomy. Significantly, plaintiff was acquitted of the charge of sodomy, and convicted only of committing an indecent, lewd, and lascivious act (wilfully and knowingly placing his head in the airman's lap with his face in close proximity to the latter's exposed privates). The testimony of the civilian police officers, that they had observed the accused's head in the vicinity of Hodges' exposed privates, is not necessarily inconsistent with the accused's defense that he was very sleepy and fell asleep. There was testimony that Augenblick was prone to cat-naps. Obviously, statements made at the Naval Weapons Plant interrogation could have been

of great significance in the cross-examination of Hodges.

The content of this first interrogation assumes even greater importance given the nature of the accusation and the background of the accused. Like other sex crimes, the accusation here, the heinous crime of sodomy, is not difficult to utter but arduous to defend against. It is not unknown for such charges to be concocted by frightened, psychologically disturbed, perverted, or greedy individuals. Testimony revealed that, so far as was known, this accused never previously acted in the manner charged and has been and continues to be held in the highest esteem by his fellow officers. But such evidence can be insufficient in the face of direct and explicit accusations of unnatural conduct. It is here that knowledge of the early morning interrogation of Hodges could have been specially important to the defense in the court-martial. *Cf. Kyle* v. *United States,* 297 F. 2d 507, 512 (C.A. 2, 1961). It is no matter that the information would bear on the main witness' credibility rather than directly on the accused's guilt. Indeed, the court-martial panel's "estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence * * *" *Napue* v. *Illinois,* 360 U.S. 264, 269 (1959); *Giles* v. *Maryland,* 35 U.S.L. Week 4181, 4183, 4191 (U.S. Feb. 20, 1967); *People* v. *Savvides,* 1 N.Y. 2d 554, 557; 136 N.E. 2d 853, 854–55, 154 N.Y.S. 2d 885, 887 (1956).[17]

If the accused were able to discover what had transpired at the interrogation through other means, the prejudicial effect of the Jencks Act violations would have been lessened. See *Rosenberg* v. *United States,*

[17] These comments are all applicable, with lesser force, to Mendelson's hand-written notes (if they proved to be producible).

360 U.S. 367, 370–71 (1959). The defense did have the opportunity to question Hodges on the interrogation. This, however, could not serve as an adequate substitute for being able to ascertain what the witness had actually said (and what was said to him by the inquiring officers) shortly after his arrest. Plainly, the effectiveness of the trial cross-examination was curtailed by the defense's inability to gain access to the witness' prior statements. Nor was Hodges' five-page statement prepared later at Air Force (OSI) headquarters in Suitland, Maryland, a sufficient replacement. That paper, written in the presence and with the assistance of an OSI agent, was compiled several hours after the initial interrogation. It did not shed any light on the conduct or statements of the participants at the earlier Naval Weapons Plant interrogation.

Of course, it may have been that the tape-recording or Mendelson's notes would not have proved helpful to the accused, or that they may have been shown (if Mendelson had been called to testify) to have been lost or destroyed in good faith and without fault, or that they may have been proved never to have existed at all, or that the notes would turn out not to be producible under the Jencks Act. But, in view of the critical importance of Hodges' testimony and of his interrogation at the naval station, plaintiff was strongly entitled to have these matters pursued and judged with the burden of proving good faith resting on the Government and with proper action by the trial judge to obtain and evaluate the materials. In the absence of satisfactory alternative means of discovery, the legal errors committed by the law officer and the Board of Review deprived the accused of rights which were extremely valuable to him—of cardinal moment in this case. He was denied a necessary step toward obtain-

ing, or discovering the status of, materials of first-rank for his defense. In our view, this denial, in the circumstances, seriously impeded his right to a fair trial in violation of the Due Process Clause of the Constitution.

Since his conviction and dismissal were thus invalid, plaintiff is entitled to recover back pay and allowances, less appropriate offsets, from the date on which the pay and allowances were withheld to the date of judgment. The plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. Judgment is entered to that effect. The amount of recovery will be determined under Rule 47(c).

APPENDIX B

DEPARTMENT OF THE NAVY,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington 25, D.C.

In The Board of Review, U.S. Navy, Before
GEO. F. STEARNS, JR., Z. W. NEFF, AND W. S. TYSON
NCM62 0386

UNITED STATES
v.
RICHARD G. AUGENBLICK, 102649/11, COMMANDER, U.S. NAVY

Review pursuant to Article 66(c), UCMJ, of general court-martial convened by Commandant, Potomac River Naval Command, U.S. Naval Station, Washington 25, D.C. Sentence adjudged 13 September 1961

(Decided 20 September 1962)

CDR WERNER WINDUS, USNR, Appellate Defense Counsel.

CDR CARL B. KLEIN, USNR, Appellate Government Counsel.

A. KENNETH PYE, Esquire, Individual Counsel for Accused.

DECISION

Upon trial by general court-martial accused pleaded not guilty to the Charge and specification thereunder alleging sodomy in violation of Article 125, Uniform

Code of Military Justice. He was found guilty by the court of the lesser included offense of an indecent, lewd and lascivious act in violation of Article 134 of the Code. He was sentenced to be dismissed from the service. On 8 March 1962, the sentence was approved by the convening authority.

The voluminous record in this case is composed of eight volumes which include, (1) Article 32, pretrial investigation, (2) the original trial wherein the charge and specification was withdrawn by the convening authority, (3) a Court of Inquiry, (4) another Article 32, pretrial investigation, and (5) the second or completed trial.

Appellate defense counsel has assigned three errors which we shall, insofar as is practicable, discuss in the order as submitted. However we will first set forth briefly the facts which gave rise to the preferring of the charge and specification against this officer.

The evidence adduced indicates that on the night in question the accused after having attended an office party where he consumed drinks of scotch with little water, proceeded to his home. Not feeling like turning in, he left home and visited a restaurant with a bar located in Virginia, where he had a few beers and then proceeded to an officer's club at a nearby Army Post. There he drank more beer, watched T.V. and then proceeded to Washington, where he visited a bar and again watched T.V. and drank more beer. In the meantime, becoming extremely tired and desiring a cup of coffee he entered a "White Tower" restaurant, where he secured his coffee and engaged in conversation with an airman who was waiting for a bus which would return him to his base in nearby Maryland. It is not clear from the record who initiated the conversation but it resulted in the accused and the airman taking a ride in the accused's automobile.

Eventually, the accused parked the automobile in the vicinity of West Potomac Basin where they were apprehended by two Metropolitan Police Officers, taken to the Third Precinct, charged with disorderly conduct, and delivered over to military police. The accused testified in his own behalf that he was driving toward the "Fourteenth Street Bridge"; that he was very, very sleepy and felt that it was unsafe to drive and therefore stopped in the area mentioned and went to sleep; that the next thing he remembers is the glow from the flashlight of one of the arresting officers. The airman, who was in full military uniform at the time of the arrest, testified for the prosecution, that the accused first informed him that he had his, the accused's, uncle's car and that they could go to his uncle's home for some rest; that refusing this offer he went for a ride with the hope of being returned to his base; that upon parking the automobile accused asked whether he could lay his head in the airman's lap and after certain preliminaries an act of sodomy was performed upon him by the accused. The arresting police officers testified that they noted the accused's head disappear from the driver's side of the vehicle and upon inspection found the accused's face very close to the exposed privates of the airman.

I. THE LAW OFFICER ERRED IN DENYING THE ACCUSED'S ACTION TO DISMISS THE CHARGE AND SPECIFICATION ON THE GROUND OF FORMER JEOPARDY

For the purpose of clarity it is felt appropriate to review the particular parts of the various proceedings having a bearing upon this assignment.

At the outset of the first Article 32 pretrial investigation, defense counsel objected vigorously to going ahead with the proceedings in the absence of the two

Metropolitan Police Officers who would not appear unless subpoenaed. The defense counsel stated "There is a procedure in existence for securing their presence." The investigating officer noted the objection and throqugh sworn testimony of an agent of the Office of Naval Intelligence accepted as evidence written documents containing jurats and purporting to be the sworn statements of the two police officers. Upon completion of the investigation the investigating officer recommended that the accused be brought to trial before a court-martial. *United States* v. *Samuels,* 10 USCMA 207, 27 CMR 280.

During the first trial held on 1 May 1961, the defense counsel, renewed the objection, concerning the appearance of the police officers, made at the Article 32 pretrial investigation, and moved that the charge and specification be dismissed and stated in part:

> Those policemen were readily available by processes of the Navy with which the Legal Officer was completely aware, namely that a Court of Inquiry, which would have subpoena power, could be employed, and objections were made at that time to the investigating officer against proceedings with the investigations in the absence of those officers. (R14, 16, Vol. II).

We also find the following language in further argument on a motion for dismissal by defense:

> I believe and I submit to the law officer, that I don't think I could have made it any clearer right at the very outset that we've not only objected, but without using the words "Court of Inquiry" as such, which I say again, I don't think was necessary; the Investigating Officer, the Commander, the Legal Officer, he knew what I meant without using the touch stone, Court of Inquiry, but we were told that this is the proceedings, this is the way we are going to proceed and that's it. (R27, Vol. II).

After much argument by the defense and government in an out-of-court hearing concerning the defense's motion to dismiss, the law officer has this to say:

> * * * as to the second aspect of the defense motion as noted I consider it a motion for appropriate relief since this is the proper motion directed to alleged defects in the pretrial investigation. As I noted previously, the defense has an opportunity to examine these witnesses prior to the time that they testify if the defense so desires and the request is made for such opportunity. In this light I would inquire of the defense for purposes of clarity whether the defense desires at this time a further pretrial investigation or a court of inquiry to be held in this matter? (R42, Vol. II).

Defense replied:

> Yes, sir. * * * The answer to the law officer's question is that very definitely we would ask for a court of inquiry. That was what we had meant by implication at the very beginning, sir. (R43, Vol. II).

The law officer denied this aspect of defense motion stating:

> The material presented by the defense makes it appear that the testimony of the two police absent witnesses at the pretrial, whose absence was objected to by defense, was received by the pretrial investigating officer in the form of sworn statements as prescribed by paragraph 34, Manual for Courts-Martial, Article 32, UCMJ and currently decided case law. Further it does not appear that an effort or request was made on the part of the defense to avail itself of the procedures specified in Article 49 of the Uniform Code of Military Justice. Nor does it appear from the matter presented that the Commanding Officer of the accused at the time

> of the pretrial investigation acted arbitrarily or capriciously in holding an Article 32 type investigation with knowledge that the 2 police officer witnesses if called for voluntary attendance by the investigating officer would decline to so attend and thus render them unavailable since subpoena powers did not exist with the investigation officer. Nor does it appear that the Article 32 type investigation was held or directed with the intention of depriving the accused of confrontation and cross examination opportunities. It is therefore my opinion that the proper purposes of Article 32, UCMJ were served by the pretrial investigation held and that such investigation was lawfully conducted. Your motion in this regard is therefore accordingly denied. (R44, Vol. II).

The out-of-court hearing having been concluded the court reopened and the airman testified, giving very damaging evidence against the accused. At the conclusion of the airman's testimony the trial counsel announced that his next witness would be one of the police officers. At this time the Law Officer afforded the defense whatever opportunity it desired in connection with examining the witness prior to his testifying at trial. (R107, Vol. II.) The court recessed to afford defense time to examine the witness. There was then another out-of-court hearing wherein the defense stated that in their interrogation of the police officer he categorically stated that he had not sworn to the statement which was later accepted by the investigating officer at the pretrial hearing and to which reference was made that it was a sworn statement. (R111, Vol. II.) The defense, because of this, again moved to dismiss the charge and specification as being defective ab initio. (R112, Vol. II.) The police officer was then called and examined by the trial and defense counsel. During the examination the police officer stated, "No, sir. I never swore to the facts

in that statement." (R114, Vol. II.) After hearing testimony given by the ONI Agent who took the statement from the police officer and testimony of the Investigating Officer the Law Officer stated that he considers the motion made by the defense to be a motion for appropriate relief and "should be granted and is so granted in that regard.": He further considered it a matter properly within the province of the Convening Authority to determine what disposition is to be made of this matter and as to any further action in regard to the charge and specification.

Thereafter the Convening Authority withdrew the charge and specification from the Court and on 12 May 1961 convened a Court of Inquiry which met on 23 May 1961. At this Court of Inquiry the police officers testified under oath. The Court of Inquiry recommended that the accused be brought to trial by general court-martial on charges of violation of Articles 125, 133 and 134, Uniform Code of Military Justice. (R185, Vol. III.)

On 13 July 1961, at the request of the defense, an additional pretrial investigation was held for the purpose of discovery, through examination of witnesses under oath, and to obtain and record the sworn testimony of certain witnesses. We need not, at this time, concern ourselves with this particular investigation as it does not bear on the assignment presently before us. (R1, Vol. V.)

On 10 August 1961 a new general court-martial composed of new members was convened for the purpose of trying the accused for the violation of Article 125, Uniform Code of Military Justice, one specification alleging that he committed sodomy upon the body of a particular airman. The court met on 14 August 1961 and at the request of the defense a continuance was granted until 5 September 1961. On this date the

court re-convened and the defense counsel moved that the charge and specification be dismissed on grounds that the Fifth Amendment of the Constitution was violated. (R25, Vol. VI.) After much argument by defense and government, the Law Officer denied the motion. (R49, Vol. VI.)

With the above background in mind we now move to the first assignment. In support of this assignment appellant avers that it is well settled that jeopardy attaches when evidence has been received on the general issue, citing *United States* v. *Wells,* 9 USCMA 509, 26 CMR 289, and that such evidence had been received in the instant case. It is further argued that had the convening authority withdrawn the charge with the consent of the accused or upon the accused's motion, there would be no complaint but at no time did the accused move or consent to the withdrawal of the charge. Appellant also contends the lack of consent plus the subsequent proceedings brings the case squarely within the guidelines of *Green* v. *United United,* 355 U.S. 184, 78 S. Ct. 221; also, cited is *United States* v. *Gori,* 376 U.S. 364, 81 S. Ct. 523 (1961), *Wade* v. *Hunter* 336 U.S. 684, 69 S. Ct. 834, and other authorities.

Appellee counters with argument that there was no exception taken by the defense on the Law Officer's rulings in denying the defense motions to dismiss; that the government gave the accused his desired relief and therefore he cannot now complain. Citing 15 Am. Jur., Criminal Law, Sec. 403, and *United States* v. *Ivory,* 9 USCMA 516, 26 CMR 296, and other authorities.

We are mindful that this assignment presents a serious question concerning the meaning and application of that provision of the Fifth Amendment to the Constitution which declares that no person shall

"be subject for the same offense to be twice put in jeopardy of life and limb * * *."

However, the former jeopardy provision of the Fifth Amendment does not mean that every time an accused is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. When this may be done without barring another trial depends upon all the circumstances of the particular case and not upon the mechanical application of an abstract formula. (*Wade* v. *Hunter,* supra.)

From the very beginning of the first Article 32 pretrial investigation, the counsel for the accused, maintained their right to have certain witnesses present for the purpose of cross examination. Although not using the particular phrase "Court of Inquiry", the defense made it clear to the investigating officer that there was, in the service, an established administrative procedure which includes subpoena powers requiring the presence of witnesses for the purpose of examination.

The investigating officer through the sworn testimony of witness Mendelson, an ONI agent, accepted two statements of the police officers. Prior to the receipt of the statements the investigating officer had received the oral testimony of the airman who was subjected to vigorous cross examination by defense counsel. The investigating officer also attempted to secure the presence of the two police officers but was informed by competent authority that they would not appear unless subpoenaed.

The Article 32 pretrial investigating officer is not required to decide difficult legal questions or adhere to the strict rules of evidence. Accordingly, he is not precluded from considering statements of witnesses not available for personal testimony, even though this

unavailability effects the accused's rights to cross examine. *United States* v. *Samuels*, supra.

In examining the sworn testimony of the airman, we are of the opinion that the investigating officer possessed sufficient information and grounds upon which to base a recommendation for trial by court-martial. "An Article 32 pretrial investigation is a preliminary proceeding, not a trial on the merits." *United States* v. *Samuels*, supra.

In view of the testimony of the police officer, that he had not sworn to the statement the law officer was faced with the possibility of a defective pretrial investigation, notwithstanding the fact that much testimony damaging to the accused had been presented by the airman and further that the defense had now taken advantage of the law officer's offer affording the defense the opportunity to fully and completely examine the police officers. Confronted with this unique situation the law officer made the following ruling:

> Lo. Well, I believe that on the authority of the Samuel's case at least there is a question of fact here as to whether or not the statement of Mr. Round was in fact sworn to, and I don't consider it within the province of the law officer to determine such a question of fact. I think it is not properly a matter for the court to determine, since it is a matter not concerned with findings. I consider it is a matter which is properly within the province of the Convening Authority to determine what disposition is to be made as to this matter and as to any further action in regard to the Charge and Specification. On that basis, I consider that the motion made by the defense, which I consider to be a motion for appropriate relief, should be granted and is so granted in that regard. Under those circumstances, you will advice the Convening Authority that the motion for appropriate re-

lief has been granted based on matters concerning the validity of the pretrial investigation for whatever further disposition he desires to make. (R134, Vol. II.)

The defense made no objection to the law officer's ruling. Thereafter the convening authority withdrew the charges and specification from the court and convened a Court of Inquiry. Thus the defense was finally granted that which he originally requested. (R43, Vol. II). *United States* v. *Stringer*, 5 USCMA 122, 17 CMR 122.

Appellant relies rather heavily upon the dissent in *Wade* v. *Hunter*, 336 U.S. 684, 69 S. Ct. 834, and the case of *Green* v. *United States*, 355 U.S. 184, 78 S. Ct. 221.

In *Wade* v. *Hunter*, supra, the convening authority of a general court-martial withdrew the charge from a court which had heard argument of counsel, closed to consider the case, and then opened and requested two witnesses who were 22 miles away and too ill to travel. This occurred in Germany at a time the American troops were advancing. In view of the tactical situation, the distance to the residence of such witnesses had become so great that the case could not be completed within a reasonable time, therefore, the case was transmitted to another commanding general nearer the witnesses. A new trial was held and the accused pleaded former jeopardy which was denied and he was convicted. He then brought habeas corpus proceedings in federal court. The court ordered his release and the case went to the Supreme Court. In overruling the lower court the Supreme Court said that there may be unforeseeable circumstances that arise during a trial making its completion impossible and in such event the purpose of law to protect society from those guilty of crimes frequently would be frus-

trated by denying courts power to put the defendant to trial again. The court went on to say that the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. The minority asserted that the harassment to the defendant from being repeatedly tried is not less because the Army is advancing and that the guarantee of the Constitution against former jeopardy is not to be eroded away by a tide of plausible-appearing exceptions.

As stated above, the law officer was faced with a unique situation, a possible defective pretrial investigation which may well have been the basis for nullifying the entire proceedings. The Court of Military Appeals in the *Samuels* case, supra, made clear that should witnesses not be available for examination during a pretrial investigation, any statements of such witnesses must be sworn statements. This protects the accused from baseless charges and assures the convening authority of possessing reliable information upon which to base his decision concerning the disposition to be made of the matter. The courts are forever seeking the truth and jealously protect the rights of an accused not to be tried upon scurrilous information. *United States* v. *Nichols* 8 USCMA 119, 23 CMR 343.

The defect here is considered a judicial one which strikes at the heart of our judicial proceedings and, therefore, required immediate remedial action to assure a fair trial and to keep the proceedings free from substantial doubt as to legality, fairness and impartiality. We are, therefore, of the opinion that the law officer's action in returning the case to the con-

vening authority was proper and that he did not abdicate his authority to declare a mistrial. Further, we do not believe that the convening authority usurped the authority possessed by the law officer.

We distinguish the case at bar from the *Green* case, supra, in which Green was charged with first degree murder but was found guilty and sentenced on a lesser included offense of second degree murder, however, because the jury's verdict was silent as to the original charge of first degree murder he was retried and found guilty of the original charge. Justice had been done at the first trial and there was no "manifest necessity" warranting a second trial to keep the proceedings free from substantial doubt as to legality, fairness and impartiality. In the case at bar we feel there was a "manifest necessity", warranting a second trial.

In *United States* v. *Gori*, supra, also cited by appellant, the judge, on his own motion and with neither approval nor objection by defense counsel withdrew a juror and declared a mistrial. It is unclear what reasons caused the court to take this action, which the Court of Appeals characterized as "overassiduous" and criticized as "premature". Nevertheless, the court below did not hold the ruling erroneous or an abuse of discretion. But after discussing the wide range of discretion which the "fundamental concept of the federal administration of criminal justice" allow to the trial judge in determining whether or not a mistrial is appropriate—a responsibility which "is particularly acute in the avoidance of prejudice arising from nuance in the heated atmosphere of trial which cannot be fully depicted in the cold record on appeal", the court concluded that the judge "was acting according to his convictions in protecting the

rights of the accused". The Supreme Court in affirming the action of the lower court stated in part:

> It would hark back to the formalistic artificialties of seventeenth century criminal procedure so to confine our federal trial courts by compelling them to navigate a narrow compass between Scylla and Charybdis. We would not thus make them unduly hesitant conscientiously to exercise their most sensitive judgment—according to their own lights in the immediate exigencies of trial for the more effective protection of the criminal accused.

In the case at bar the law officer clearly set forth his reasons for submitting the question to the convening authority and we have stated above our reasons for finding the law officer's action to be proper.

We find the cases of *Stringer* and *Ivory,* supra, to be of particular help in resolving the issue before us.

The Charge in the *Stringer* case was withdrawn from the first court because the convening authority considered certain remarks made by the court's president concerning the trial counsel's presentation of the case to be "highly prejudicial to both Government and the accused". The defense objected strenuously to the withdrawal of the charge and reasserted that objection by way of plea in bar when brought before the second court-martial.

The court discusses thoroughly the theory of "former jeopardy" and related articles of the Uniform Code including the legislative history of certain of these articles.

The court decided that the convening authority has the power to withdraw the charges prior to the finding when there is a "manifest necessity", with out the attachment of jeopardy and that Congress did not intend to confer on an accused, either under Article 44, Uniform Code of Military Justice, or otherwise, a

right to be placed, by reason of trial incidents beyond the control of the Government, in such a position that he may win and cannot lose in a trial.

We have determined above that there was a judicial mistake present in the case at bar and therefore it was necessary to withdraw the charge in order to keep the proceedings free from substantial doubt as to legality, fairness, and impartiality.

In *Ivory*, supra, the accused was charged with desertion under a specification which described his unit as an ordnance unit when in fact his unit was the Overseas Replacement Depot. The error resulted from the misinterpretation of "ORD" on the "morning report", and was discovered by the president of the court and made known at the time he announced the finding of guilty. The trial counsel moved to amend the specification to conform to the proof. The defense objected and suggested that the proper procedure would be a dismissal of the specification on the basis of fatal variance and the convening of a new court to try the accused on a properly pleaded charge. The law officer directed the trial counsel to consult the convening authority. The convening authority concluded that there was a fatal variance, withdrew the charge and appointed a new court. Before this second court the defense moved to dismiss the charge on the ground of former jeopardy. The motion was denied.

The Court of Military Appeals in holding the action of the convening authority to be proper stated that it could refuse to consider the merits of the accused's appeal since the procedure followed was that suggested by the defense and usually an accused cannot insist upon specific redress and then complain because the government gave him his desired relief. However, in the interest of justice the court considered the merits of the appeal. (Headnote No. 1.)

In discussing Article 44, Uniform Code of Military Justice, the Court has the following to say:

> It has been axiomatic to our jurisprudence that the jeopardy provisions of the Constitution are waived by an accused who is enjoying a new trial as a consequence of his own successful appeal from a former proceeding. This waiver would not, of course be applicable in all appeals in military law since under our procedure, an accused may be the beneficiary of certain automatic appeals. Articles 66(b) and 67(b), UCMJ, * * *.

In summary we find, at the first trial, that the police officers were present and available as witnesses; that testimony very damaging to the accused had already been received by the court through the testimony of the airman. It therefore, cannot be said that the Government lacked witnesses or that it failed to present substantial evidence. (Article 44 UCMJ) also, *United States* v. *Stringer* and *Wade* v. *Hunter,* supra.

The law officer made clear his reasons for granting the defense motion which he properly termed a motion for appropriate relief. His reasons are set forth above. He believed on authority of the *Samuels* case supra, there was a question of fact as to whether or not the police officer had sworn to his statement. And indeed there was a question, since the officer said he did not swear to the statement and ONI, agent Mendelson was not certain but felt he had taken the officer's oath after taking the statement. The law officer considered this matter not one for his or the court's determination but one within the province of the convening authority and therefore, submitted the matter to that authority. We do not doubt that had the law officer considered the matter one for his decision, he would not have hesitated to declare a mistrial. We are unable therefore, to see, as stated before, wherein the convening

authority usurped in any manner the authority possessed by the law officer or that the law officer abdicated his authority. For these reasons we distinguish this case from the objections set forth by the Chief Judge in *Stringer* and *Ivory*, supra.

From the very outset of the preliminary proceedings, the first pretrial, and again during the first trial, the defense made clear their desire to have a Court of Inquiry convened. The convening authority acceded to their desire by convening a Court of Inquiry for the purpose of correcting a possible defective pretrial investigation. There were other means at the disposal of the law officer and the convening authority to clarify this issue and remedy the defect but we do not believe it is for us to be a "Monday morning quarterback" in this particular instance since we see nothing here that would lead us to believe that the action taken by the law officer and the convening authority was for any purpose other than to cure a defect and assure the parties a fair and impartial trial. As stated, a prima facie case against the accused had already been made out. There was no objection to this procedure by the accused, and he cannot now claim prejudice on this basis. (Ivory, supra.)

There is another matter which appears in appellant's brief under this assignment, i.e., the concern of the president of the first court with what he labeled "administrative delays". There is no question that this officer displayed irritation in the delays caused by the lengthy out of court hearings. (R118–120, Vol. II.) Whether or not this irritation would have effected his and other court members impartiality is unknown and a moot question since the court was adjourned and did not reopen as the charge and specification was withdrawn from that court and none of its members sat on the new or second court. Fur-

ther although it may have been efficient reason to declare a mistrial such was not the basis for the withdrawal of the charge and specification. No prejudice to the accused resulted from the President's irritation or remarks extending therefrom.

It is our opinion that an unforeseeable circumstance arose making the completion of the first trial so legally defective as to demand a retrial. The law officer and the convening authority then took steps necessary to assure a fair and impartial treatment of both the accused and the Government. We therefore, deny this assignment of error.

II. THE LAW OFFICER COMMITTED PREJUDICIAL ERROR IN FAILING TO COMPLY WITH THE PROVISIONS OF THE JENCKS ACT

(a) The law officer erred in refusing to call Agent Mendelson for the purpose of receiving live testimony (1) relative to the missing tape recording of Airman Hodges' oral statement and (2) relating to the handwritten notes which Mendelson previously testified that he had made contemporaneously with Hodges' oral statement

(b) The law officer erred in denying the defense motion to strike Airman Hodges' testimony upon the failure of the government to produce the tape recording of Hodges' oral statement

A statement of the events bearing upon this assignment is considered appropriate.

On the night in question the Metropolitan Police notified the Armed Forces Police that they had placed the servicemen under arrest. Since the servicemen were members of different services the duty man of the Armed Forces Police notified the investigative organizations of the Navy and Air Force, Agent Mendelson of ONI Headquarters, and Agent Conner of OSI, Air Force, were assigned to the case. These agents, accompanied by Agent James of the local Navy Command's Intelligence Office met Commander Augenblick and Hodges at the Armed Forces Police Headquarters situated aboard the U.S. Naval Weapons Plant, Washington, D.C. The agents, Commander

Augenblick and Airman Hodges proceeded to an interview room. It was decided between Conner and Mendelson that since Hodges was a member of the Air Force, Conner would conduct the interrogation. Conner conducted the interrogation, Mendelson was present and stated he made some rough notes and James stated that he was in a sound booth and made an electrical recording of the interrogation. At the completion of the interrogation, which is estimated to have lasted 20–25 minutes, Conner told Mendelson that he was taking Airman Hodges to OSI Headquarters and there he would secure Hodges written statement and furnish Mendelson a copy. Mendelson then interrogated Commander Augenblick and James states he also, made a recording of this interrogation.

James testified that the next day he took the recordings to ONI Headquarters and upon finding Mendelson engaged, delivered the recordings to Mendelson's superior, Agent Fason. Fason first testified that he told James to give the recordings to Agent Scinta but later testified that he remembered receiving the recordings from James and that he gave them to Mendelson. Mendelson having been ordered to Norfolk, Virginia, for duty placed certain tape recordings, including the tape of Commander Augenblick's interrogation into the hands of personnel who are charged with the duty of storing and preserving such material. James later secured these tapes and they were played during the second pretrial investigation but the tape of Hodges' interrogation was not among them. A thorough search of ONI Headquarters was conducted with negative results in an effort to locate the Hodges' tape. Seven personnel of ONI Headquarters who had official connection with the handling, storage and filing of tape recordings were questioned concerning the whereabouts of the Hodges' tape. After

an extensive examination and cross examination of these witnesses including Agents James, Mendelson and Fason no one could be found who had heard a play back of the Hodges' tape or who had seen the tape except possibly James who as stated before, gave the tapes to Fason.

After Hodges had testified on direct examination at the second trial, the defense demanded production of (1) the tape recording of Hodges' testimony made by Agent James during the interrogation of Hodges and (2) notes made by Agent Mendelson at the initial interview. The law officer, without calling Agent Mendelson, reviewed the testimony of Mendelson and others set forth in the records of the pretrial investigations and Court of Inquiry and denied the motion to produce the notes on the ground that these notes did not constitute a "statement" within purview of 18 U.S.C. 3500. The law officer ordered Government to produce the tape recording or show cause why it was not available. The Government through witnesses showed that a thorough search for the tape was unsuccessful. The defense then moved that Agent Mendelson be produced to testify concerning the tape, particularly in view of Agent Fason's testimony to the effect that he gave the recording to Mendelson. The law officer refused to require his production and denied the defense motion to strike Hodges' testimony.

In taking the action outlined above, appellant avers that the law officer erred in that the so called Jencks Act, 18 U.S.C. 3500, which outlines the procedures governing the production of statements made by witnesses of the United States, was violated. In support of argument in this respect appellant relies upon *Campbell* v. *United States*, 365 U.S. 85; *Palerno* v. *United States*, 360 U.S. 343; *Clancy* v. *United States*, 365 U.S. 312; *United States* v. *Thomas*, 282 F. 2d 191;

United States v. *Aviles*, 200 F. Supp. 711; *Killian* v. *United States*, 82 S. Ct. 302; and other authorities.

Appellee countered to the effect that through the testimony of many witnesses it was shown that no one had ever played or heard the tape played and that a thorough search to locate same was unsuccessful, therefore, logic is more on the side that there was never a tape than it is on the side that there ever was one. As to Agent Mendelson's notes, appellee states the notes were made by Mendelson during the initial interview of Hodges by Agent Conner; that at this interview Mendelson, Conner and Hodges were present and upon completion of the Interview Conner took Hodges to OSI Headquarters where Hodges' statement was written and therefore his notes had nothing to do whatsoever with the writings of Hodges' statement.

The Jenck's Act, 18 U.S.C. 3500, provides:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Pub. L. 85–269, Sept. 2, 1957, 71 Stat. 595.

There is no question but that the statute requires the production of any statement of a government witness, including an electrical recording of an interrogation, *in possession* of government which relates to subject matter as to which witness has testified. When it is *doubtful* whether production of a particular statement is compelled by statute, such statement must be submitted to the judge for an in camera determination. The defense, of course, may use such material for impeachment purposes. *Killian* and *Campbell*, supra.

Unlike the *Campbell* case, supra, wherein the judge refused to require the Government agent to appear and submit to examination by the defense, the record of the case at bar is replete with evidence which supports the position that the law officer went to great lengths to assist the defense and government in their quest to locate the missing tape recording or determine what disposition had been made of it. The law officer demanded the government to produce the tape. When it could not be located he granted recesses to allow searches to be conducted for the tape and the call of witnesses which might shed light as to its whereabouts. Agent Mendelson testified that he did not order or request Agent James to make a recording of Hodges' interrogation, did not hear a replay

of the recording and did not receive the recording, although he did receive the recording of Commander Augenblick's interrogation and other recordings not germane to this case. None of the witnesses, including James, had heard a replay of the recording, in fact none, except James, had seen a tape known as a recording of Hodges' testimony during that first interrogation. Agent Mendelson did not interrogate Hodges, it was Conner who conducted the initial interrogation as he was the OSI, Air Force Agent in charge of the case and Hodges was an airman. Except for Agent James testimony that he made an electrical recording of the initial interrogation, there is no other evidence that, at this time, a statement by Hodges exists since Agent Conner took Hodges to the Air Intelligence Headquarters where Hodges with Conner's assistance made a written statement, a copy of which was given to Agent Mendelson and was available for inspection by the defense. Agent Mendelson appeared as a witness, several times during the various phases of the proceedings, having been recalled from Norfolk on one occasion. He was subjected to vigorous cross examination by the defense. We therefore, cannot agree that Agent Fason's testimony to the effect that he remembered giving certain tape recordings, received from Agent James, to Agent Mendelson, warranted the ordering of Agent Mendelson to again appear as a witness for this purpose. Testimony had been received that prior to his transfer to Norfolk, Agent Mendelson handed over all recordings in his possession—including Commander Augenblick's to custodians of this material.

Furthermore, Airman Hodges testified during the first pretrial, Court of Inquiry, second pretrial and the second trial. He withstood vigorous cross examination by the defense. His testimony did not waver.

In view of the foregoing we feel much as the court did in *Aviles*, supra when it commented upon the government's failure to produce certain notes taken by an Assistant U.S. Attorney during his interview of a witness he was preparing to testify at trial, by stating:

> * * * "and while this question can rarely be answered in the negative without grave doubts, we feel confident that we are presented here with that rarity so that we can state, under the circumstances, that defendants would not have been materially aided, that denial of access to the notes in issue did not influence the result and that, in sum, their cross examination was not unduly restricted." Mindful of the Supreme Court's admonition in *Rosenberg*, 360 U.S. 371, that a "court should not confidently guess what defendant's attorney might have found useful for impeachment purposes in withheld documents to which defense is entitled", nevertheless, the court stated, "in content of this long trial and in view of the fact that the witness's credibility had been so exhaustively explored we hold that the failure to produce the notes was not prejudicial to defendants".

In the case at bar there was no resistance to producing the tape recording, it was the failure to find the recording, nor is there any evidence of destruction or bad faith or deliberate refusal to produce, as suggested by appellant in his supplemental brief. All of the witnesses were under oath and we cannot without substantial evidence to the contrary, hold that there was a deliberate refusal to deliver the tape or that these government employees were guilty of gross negligence of a degree requiring corrective action on our part.

It was the responsibility of counsel for defendants, to pursue ascertainment of correctness of the Govern-

ment's claim that the tape recording which was demanded for production is no longer in existence, and for no reprehensible reason chargeable to the Government. The law officer, in our opinion, assisted the defense immeasurably in the attempt to locate the tape. We are unable to see wherein he abused the discretion allowed a judge in determining matters of this nature, nor are we able to see wherein his action prejudiced the accused. On this basis we find this part of the assignment without merit. *Campbell, Aviles* and *Killian cases,* supra.

The notes taken by Agent Mendelson were offered to the defense during the Court of Inquiry investigation. The following is the colloquy wherein Agent Mendelson offered defense the notes:

> Q. Now, where are those notes that you took?
> A. I believe that I can produce them if you feel necessary. They were just rough pencil notes as far as I recall. I don't have them with me, but I may still have them.
> Q. Now at that point had you talked with either of the civilian policemen?
> A. No, sir, I had not. (R116, Vol. III.)

At this point the defense questioning concerned the general practice of reporting by the Armed Forces Police.

During the second pretrial Agent Conner was called as a witness and it is felt that the following colloquy pertaining to the interrogation of Airman Hodges, which took place during examination by defense sheds some light on the question before us:

> Q. Did Mendelson do any of the questioning at this interview—did he?
> A. Yes, sir. As I recall, he asked a few pertinent questions as to "Now was the individual dressed?" "Did he Hodges know the individual to be a member of the U.S. Navy?" "Did he

know his rank?" and a few other questions along that category, and "Whether or not he could recognize this person again?" Just along that category sir.

Q. And do you recall what the answers to those several questions were?

A. Oh, Hodges replied he couldn't recognize the individual and he described the automobile, described the attire, the civilian clothing the commander was wearing—allegedly wearing—and he did not know his last name. He knew him as "Dick". He said the individual introduced himself as "Dick".

Q. He didn't say that he knew that he was in the Armed Services or the Navy specifically?

A. No, he didn't. He didn't say. If my recollection is correct, he did not say he was a member of the Armed Forces.

Q. Well, didn't you say that Mendelson asked him if he was?

A. Yes, and I believe the answer was "He didn't know."

Q. And that interview took about fifteen minutes, you say?

A. That is correct, sir—perhaps less.

Q. And then what occurred?

A. We left Airman Hodges sitting in the interrogation room while Mendelson and I departed. I told Mendelson at that time I would take Hodges to our office at Suitland, Maryland, and obtain these written statements, which at that time Hodges agreed that he would furnish to the OSI. Having no further need for Mendelson—having no further dealings with Agent Mendelson, having no further need for me or for me to be there, I departed, taking the airman with me. Mendelson said that he would proceed to interview the commander and, of course, a copy of the statements and the ONI reports would follow.

Q. Now did either of you take any notes during this interview at the Weapons Plant?

A. I took no notes.

Q. And do you recall what Mendelson did?
A. No, sir, in that respect I can't—I don't believe he did. (R17-18, Vol. V.)

Agent Mendelson being questioned by the defense, in the following colloquy, states the nature of his notes taken during Agent Conner's interrogation of Hodges:

Q. And do you recall any questioning that you yourself did of Hodges?

A. No I didn't. I left most of the questioning to Conner. I may have asked him a couple of questions, but we don't usually break in on another man's interview. I may have asked him a couple of questions because I did, as I think I mentioned before, I did jot down a couple of rough notes at the time.

Q. And I assume that you made a recording of this that you could refer to so as to be certain as to these aspects, isn't that correct?

A. No, I'm not certain that we had any recording. I do recall that the information that was given at this interview was later more or less typed up in—you might say a memo report from my own information just setting down such things as what time I was called, what time I arrived there, and what Hodges said. But in putting down what Hodges said, I used Navy terminology briefly, which would not—in other words it wasn't verbatim—of what Hodges said, in my little memo.

Q. Well, now, Mr. Mendelson, these interview rooms are set up as such so that recordings may be made of the interview of an interviewer, isn't that correct?

A. Yes, sir.

Q. And is it also correct that an electronic or some sort of mechanical recording was made of this interview?

A. I'm not sure that an electronic or a recording was made of this interview. There was

a recording made of my interview with Commander Augenblick.

Q. And that was in the same room which you had interviewed Hodges, isn't that correct?

A. Yes, sir.

Q. And the reason that you used that room for initially the interview of Hodges and subsequently the interview of Commander Augenblick was so that it may be recorded, isn't that correct?

A. Not necessarily. We don't record every interview we make, but we can—we use them because we can if [we] feel it's necessary.

Q. Well, now, you know definitely that a recording was made of Commander Augenblick's.

A. I do.

Q. With reference to his interview?

A. I do.

Q. Do you know whether or not it was made of Hodges?

A. I can't recall right now if it was. It might very well have been, but I don't have * * *.

Q. The likelihood is that it was, was it not?

A. No, the reason that I can't recall whether it was is because we had, we felt, two witnesses to any statement that Mr. Hodges may have made and therefore we may not have recorded Hodges' testimony at that time figuring that the statement and the two agents would be corroborating enough.

Q. Well, now, how can this be determined?

A. Well, I can only make a check on it and find out.

Q. Could that be done now?

A. I think so. I could probably make a telephone call back to the office over there and find out whether or * * *

Q. Don't you recall of your own independent recollection, Mr. Mendelson?

A. I honestly don't. As I say, the reason I don't recall that was because I don't have it, as I do have the recording in the case of Com-

> mander Augenblick, and this was a verbal interview of—where no statement, no written statement at that time was taken, and we felt that * * * Conner said he would pre-interview Hodges and later on supply me with a written statement. (R51–53, Vol. V.)

We see from the above colloquy that Agent Conner conducted the initial interview of Airman Hodges; that Agent Mendelson did ask Hodges a few questions; that Agent Mendelson did make a few rough notes; and that the rough notes were not a verbatim record of Airman Hodges interrogation. Also, that no written statement was made by Airman Hodges at this time. Further, the defense apparently did not consider Agent Mendelson's notes to be of particular significance as they did not, at this time, request their production.

Jencks v. *United States,* 353 U.S. 657, holds that the defendant on trial in a federal criminal prosecution is entitled, for impeachment purposes, to *relevant* and competent statements of a government witness in *possession* of the Government touching the events or activities as to which the witness has testified at the trial. The command of the statute is thus designed to further the fair and just administration of criminal justice, a goal of which the judiciary is the special guardian.

It is also the function of the trial judge (law officer) to decide, in light of the circumstances of each case, what, if any, evidence extrinsic to the statement itself may or must be offered to prove the nature of the statement. *Campbell,* supra.

The Jencks Act limits access by defendants to such government papers as fit the act's definition of "statements" which relate to the subject matter as to which the witness has testified. *Palerno,* supra.

In determining whether notes are producible, i.e., whether they are "statements" the standard to apply is "do they set forth in substance what the witness said". Further, the notes must be "substantially verbatim recital of an oral statement made by said witness to an agent of the government and recorded contemporaneously with the making of such oral statement. See section (e)(2) of 18 U.S.C. 3500, supra.

Now then, the law officer had before him all of the previous proceedings that had been conducted. In denying the defense motion for the production of Agent Mendelson's notes he stated:

> LO. Well, I'm basing my ruling primarily on the additional pretrial which I have before me and also the fact that in order to qualify under Title 18 of the United States Code, Section 3500 is that this must be a statement, and I feel that the tape recording certainly qualifies in that respect; I do not feel at this time that the notes that the agent may have made in particularly using navy terminology, that it is necessary to proceed further than the tape recording. (R77-78, Vol. VI.)

There was further argument after which the law officer stated:

> LO. The original ruling I made still stands, that is, the government will not be required to produce any rough notes that agent Mendelson allegedly made, however, the government is directed to produce the tape recording of the initial interview of Hodges, if available, and to call witnesses.

We agree with the Law Officer's ruling concerning the defense's request for production of Agent Mendelson's notes for the following reasons:

> (1) The notes were offered to defense by Agent Mendelson and defense had ample oppor-

tunity during prior proceedings to request the notes. This they failed to do.

(2) The notes do not meet the criteria of a "statement" as set forth in (e)(2) of 18 U.S.C. 3500. There is ample evidence of record that the notes were "a few rough notes" and not a verbatim recital of the oral statement made by Airman Hodges at the initial interview.

(3) Hodges' written statement was made in the presence of and with the help of Conner at OSI Headquarters, Suitland, Maryland. Agent Mendelson was not present at this interview.

(4) In the content of this long proceedings Airman Hodges was, on several occasions, vigorously cross examined by the defense wherein his credibility was so exhaustively explored that, in our opinion, the failure to produce the notes was not prejudicial to the accused.

(5) That in matters of this nature the law permits the law officer to exercise sound discretion and we do not believe that this law officer abused that discretion.

We feel that the above reasons, support the law officers holding on this point of law.

We therefore, find no merit in this assignment of error. *Campbell, Killian, Aviles,* supra, and *United States* v. *Combs* 28 CMR 866.

III. THE LAW OFFICER COMMITTED PREJUDICIAL ERROR IN FAILING TO INSTRUCT ON THE OFFENSE OF DISORDERLY CONDUCT WHICH WAS REASONABLY RAISED BY THE EVIDENCE AS A LESSER INCLUDED OFFENSE OF THE OFFENSE CHARGED

Appellant avers that the law officer should have instructed on the lesser included offense of disorderly conduct in violation of Article 134, Uniform Code of Military Justice. Appellant concedes that there was no obligation to instruct the court-martial on the elements of disorderly conduct unless it was fairly raised as a reasonable alternative to the offense

charged. It is argued that in this case the offense was raised as a reasonable alternative since both Hodges, who had been promised an honorable discharge, and the police officers were impeached by inconsistences in their stories. Upon this basis appellant submits that the court could have possessed reasonable doubt concerning whether he had committed an indecent, lewd, and lacivious act, while being satisfied that he was guilty of disorderly conduct.

Appellee counters with the argument that when a citizen becomes a soldier he submits himself to a special code of laws which have been suited to the requirements of military life and therefore, it is not befitting this concept to regard sodomy between officers and enlisted men as simply disorderly conduct. It is further argued that the law officer instructed on the lesser included offense of indecent, lewd and lascivious acts with another and that the defense made no objection to these instructions.

In his instructions to the court the law officer had the following to say concerning lesser included offenses:

> * * * I believe, under the state of the evidence, that only one lesser included offense may be in issue at this time. However, if during your deliberations you believe that any other lesser included offense may be in issue I ask that you open the court, make your feelings known and I will give you further instructions on your inquiry concerning any other lesser included offense. It would be totally improper for you to come forward with a finding of guilty of any lesser included offense on which you had received no instructions whatever. And that lesser included offense, I believe, that may be in issue is that of indecent, lewd or lascivious act with another. (R.369, Vol. VII.)

Then at the completion of the instructions and just prior to informing the court on the method of voting, the law officer inquired, and we quote:

> At this particular point I would like to inquire, now, if the Government has any further requests for further instructions or any objections to those given?
>
> TC. No request for further instructions; no objections.
>
> LO. I will ask the same of the defense?
>
> IDC. (Mr. Kendrick): Only those we requested in the closed session. (R374, Vol. VII.)

Referring back to the closed session indicated in which the law officer informed both counsel of the instructions he proposed to give, the following transpired:

> * * * before I proceed, to advise you of any proposed instructions I may have, that I would like to inquire first of the Government, what if any lesser included offense does the Government feel might be in issue?
>
> TC. I haven't given it any thought, as a matter of fact. I suggest that the lesser included offense may include an indecent or lewd act with another, which is indicated at Instruction 149 in the Law Officer's Manual, and possibly indecent assault, both of which would be offenses under Article 134.
>
> LO. Did you mean "indecent assault", Commander? I believe the only indecent assault would be committed on a female.
>
> TC. Well, then, I will withdraw that.
>
> LO. Very Well. Does the defense desire to be heard on what they consider being a possible lesser included offense?
>
> IDC. (Mr. Kendrick): We certainly would object to a lesser included offense. The charge is sodomy. We think that the evidence has got to show sodomy or nothing and that this proposed lesser included offense that has been suggested by the law officer is not in any way supported

> by any evidence. And we come back to the basic premise that it's sodomy or it isn't sodomy. It's guilty or not guilty, as I se it. (R332-333 Vol. VII.)

Appellant having taken the position at trial that there was no included offense to that charged and litigated, cannot now, on review adopt a contrary position. We reject this assignment as being without merit. *United States v. Mundy*, 2 USCMA 500, 9 CMR 130; *United States v. Wilson* 7 USCMA 713; 23 CMR 177 -hn 3.

We believe that our conclusion is correct for a further reason. Airman Hodges testified that an act of sodomy had been committed upon him by the accused. He was subjected to vigorous cross examination by the defense on at least two occasions and although his testimony may have been inconsistent as to minor details it was not inconsistent when describing the events essential to the commission of the offense charged. We have read and reread the testimony of the police officers and agree that there are inconsistencies but only of a minor nature such as who was driving the patrol car, whether the accused's automobile lights were on and whether the motor was running, etc. Their testimony was consistent as to where the accused's head was positioned in relation to the exposed privates of Airman Hodges. We do not wish to set forth the exact testimony here but it is clear in the record at pages 18, 32, 43, and 56, Volume III and pages 157, 161, 168, 170 and 176 of Volume VI. From the reading of this testimony we must disagree with appelant's contention that Airman Hodges' and the police officer's were impeached by inconsistencies in their stories.

The law is well settled that the law officer's refusal or failure to instruct on a lesser offense is not error

if that offense is not reasonably put in issue by the evidence. *United States v. Wilson*, supra; *United States v. Richardson* 2 USCMA 88, 6 CMR 88; *United States v. Williams*, 9 USCMA 3, 25 CMR 265.

In this case we have a naval officer of senior rank with some eighteen years of service who, having consumed a considerable quantity of alcoholic beverage, invited an enlisted man of the U.S. Air Force to go for an automobile ride during the wee morning hours of a particular day in January 1961. The airman was in the uniform of his service and therefore, his service status should have been obvious to the naval officer. The ride ended along the West Potomac Basin where the officer and airman were apprehended by Metropolitan Police and charged with disorderly conduct due to the position of the officer's head in relation to the exposed privates of the enlisted man. Most certainly the Navy does not expect this type of conduct on the part of one of its officers nor is it considered merely disorderly conduct.

Military officers are placed in command of our young servicemen, this confers upon an officer a great responsibility. Therefore, dishonor, misrepresentation, any act involving reflection on personal integrity or moral character is of far greater infamy, and it is looked upon with far greater opprobruim, when committed by an officer, than when committed by one from any walk of life, except, perhaps, the ministry or priesthood.

We have independently evaluated the evidence before us and have determined that the accused was not prejudiced as it is our opinion that "disorderly conduct", was not reasonably raised by the evidence and therefore, the law officer was under no duty to instruct on that offense.

Accordingly, the findings and sentence as approved on review below are affirmed.

GEO. F. STEARNS, JR.
(See Concurring-Dissenting).

Z. W. NEFF

I concur.

W. S. TYSON

CONCURRING-DISSENTING OPINION

I concur in the majority's disposition of the first assignment, but for a different reason.

In my opinion, there was no abdication of authority by the law officer when he referred the case to the convening authority, nor, conversely, was there any usurpation of the law officer's prerogatives by the convening authority, who only carried out the actions already indicated by the law officer and acquiesced in by the defense counsel. It appears obvious to me from the record that all parties were looking toward a court of inquiry—the only military tribunal, outside a court-martial, able to satisfy accused's pretrial demands for subpoenaing witnesses and which could only be convened by the convening authority.

Since a court of inquiry was convened, correct procedure required the convening authority to withdraw the case from the original court, for after having called the two police officers as witnesses and after there having been subjected to cross-examination by the defense, out of fairness to the accused the convening authority should then make a completely new determination as to whether or not the case should go on to trial. This brings me to what I feel is the determining factor with regard to this assignment.

At the conclusion of the court of inquiry and the additional pretrial, the convening authority referred

the case to a new court. From the facts in this case, I feel that he was justified in doing so to make sure that the interests of the accused were fully protected. (*Gori* v. *United States*, 376 U.S. 364; *United States* v. *Stringer*, 5 USCMA 122, 17 CMR 122); because the president of the court already had indicated he was irritated with the delays in the case—and this fact was certainly not only well recognized by the defense counsel but causing him concern, as will be shown below.

Shortly after the initial trial opened, defense counsel made a number of motions and arguments which resulted in out-of-court hearings, and, of course, impeded further progress of getting on with the trial at that particular time. The trial then proceeded on through the testimony and cross-examination of the first witness, Hodge, the alleged co-actor in the sodomy. At the conclusion of this testimony, the law officer made it known that he was going to "afford the defense whatever opportunity that it desires in connection with examining this witness [one of the police officers] prior to the time that he testifies." This prompted the following colloquy between the president and the law officer:

> LO. Well, Mr. President, I have indicated to the defense that they will have an opportunity to talk to these witnesses prior to their testimony * * *.
>
> PRES. Is this going to be a continuing thing, or is this something we can get the defense counsel caught up on? Is this going to be the question each time or each time there is a new witness, sir?
>
> LO. No, sir.
>
> PRES. If this is the case, this is going to take us an awful long time.
>
> LO. No, sir, this is just only with regard to two particular witnesses.

PRES. I wonder if the defense counsel could promise with respect to when these two witnesses could be met?

LO. Well, sir, I feel he can meet at least one of them today. The other witness has already departed apparently.

PRES. Is this going to kill the whole day again tomorrow?

LO. I believe not. I think not, sir. We could possibly set up to reconvene at 11 o'clock, depending on whether or not trial counsel can get that witness back tomorrow for interview.

TC. I will have them both back here tomorrow.

PRES. I would rather go beyond 3 o'clock and try to get something done today, if it runs that late. I do not at this time want to make a decision that we will not have any further hearing today. I prefer to give the defense whatever time he needs, and I would like to hold in abeyance the decision as to when we will terminate for the day.

LO. Fine. I am sure defense has tried to meet your suggestion as to 1500.

PRES. Well, I would much rather have you not worry too much about my time as far as hours are concerned. I am more interested about getting business done so that we can get ahead with the proceedings. I will worry about the time if they will worry about getting business done.

LO. I am sure they had that in mind, sir.

The foregoing prompted this rejoinder from the defense counsel:

IDC. May I make this clear to the court, that this is not our intentional doing, that we have not been able to talk with these witnesses before. I don't want the court to feel that we are trifling with the court's time, but I think it is very clear that despite continued efforts on our part we have not been able to even discuss the

case with these two officers, and, of course, it would not apply to any witnesses that are to be called by the prosecution.

PRES. Well, I think the thing for us to do is to close while you do that business and we will remain available in hopes that we can get on with business.

After defense counsel had examined the police officer, he pointed out to the law officer that police officer Round's statement at the pretrial had never been sworn, despite Agent Mendelson's testimony at that proceeding to the contrary. Counsel for accused then stated:

* * * Now, as I have pointed out here, we are in the second day of trial * * * and for the first time we find out that the statement was not sworn to. It is clearly a violation of the Samuel's case. * * *

Now, the other officer, of course, has been released to go back to duty * * *, *I feel that we are faced with a situation which in addition is complicated by the fact—I think it must have been apparent to the law officer as it was to everyone with whom I have discussed it with—that when the court adjourned to permit* * * * *me to interrogate this police officer, the court was obviously very much irritated,* and what I feel was not knowing all of the facts, *what they felt was a typical defense dilatory tactic of some sort,* but I think the law officer recognizes * * * that this is not of our doing at all. *Yet, we have an officer's career at stake before an obviously irritated court. I have a feeling that the feeling expressed by the president in so many words and by the obvious demeanor of several of the other senior officers immediately adjacent to him that—is the case ever going to get on, in effect. In that respect, we will*—first of all, I would renew my motion based on this defect in the pretrial proceedings * * * and I would like * * * to call

this police officer (as a witness for the limited matter that I have stated) to the court. Therefore, subject to the law officer's desires on that subject, I will *move to dismiss the charge and specification as being defective ab initio.* (Emphasis supplied).

Police Officer Round was called and testified in the out-of-court hearing that he was not sworn at the time he made the pretrial statement. At the completion of his testimony, the law officer pointed out that the investigating officer and the ONI Agent Mendelson would have to be called. This again prompted defense counsel to express his concern over what he felt was the animus against him and his cause by the members of the court. He asked the law officer:

> Sir, before we recall the court, may I respectfully inquire as to what you plan to say to the court?

The law officer answered in part:

> I'm going to admonish them that it is not due to any circumstances involving the defense or is it to be construed in any way—reflects on either counsel or the accused and any member who feels that he is being—has his mind concerned with this aspect of delays should kindly so indicate at this time.
>
> IDC. I deeply appreciate that.

The court was reconvened and the law officer kept his word, which prompted the following exchange between the law officer and the president:

> PRES. I would hope that in the future that the time of the court could be given some consideration. While we met from ten until three, I feel that these other things may well go in other hours than between ten and three. I would like to know administratively what can be done to assist either side? I'm not interested

in which side. I'm interested in reducing delays. Who is the man to see in that connection?

LO. There is nobody to see. It is my responsibility to see that this trial is conducted in a fair, orderly, and impartial manner.

PRES. Including the administrative matters?

LO. Including any matters in that connection. When I think that the trial can be speeded up, I will do so.

PRES. Certainly it hasn't been speeded up here so far without any question of the legal side. It seems to me that it is unnecessary for us to sit while these things which I think could have been done long before, such as the things this afternoon. Do you agree?

LO. No, sir. I do not agree with you because my position is that the defense is entitled to interview these witnesses, and that's what I'm going to do.

PRES. There is no question there administratively be the opportunity to interview them?

LO. I'm not in a position to so say, Admiral.

PRES. I want to find out who is concerned with that.

LO. Admiral, I recommend that you ascertain your answer to that question upon completion of trial.

PRES. And accept whatever comes along in the meantime.

LO. I can only say, Admiral, that I am bound under the law to make the rulings and to let the case proceed as I best deem it to proceed, and any other aspect of the case if attempted to be gone into during the course of trial, I feel would prejudice the case. In other words, administrative assistance to avoid those delays would help prejudice this case. There isn't any administrative assistance that could speed up this case. There is just no practical way of doing it any other way. Whether or not it could have been done before is not the point.

PRES. Can you indicate to me who has this concern quite apart from the court as to what could be done to avoid this sort of administrative delay?

LO. This delay, Admiral, is not administrative at the present time.

PRES. Well, I'm not sure that I understand that. However, I think there is nothing that can be done under the circumstances. The court will * * * adjourn * * *.

The convening authority may withdraw the case from one court and refer it to another when in his opinion—taking all the facts into consideration—there exists a manifest necessity to prevent a miscarriage of justice. As pointed out by the Supreme Court in *Wade* v. *Hunter*, supra, there have been cases where the trial judge has discovered facts, during trial which indicated to him that a member—or members—of the jury might be prejudiced or biased against either the accused or the Government, and "It is settled that the duty of the judge in this event is to discharge the jury and direct a retrial." In my opinion, from the facts in this case, the defense counsel was justified in feeling that the president of the court was "irritated"—along with "several of the other senior officers immediately adjacent to him"—at what counsel felt the president believed to be a "typical defense dilatory tactic." Accordingly, under the facts of this case, the convening authority was called upon to refer the case to a new court in order to ensure that the ends of justice were not defeated. *Wade* v. *Hunter*, supra.

In summary, I do not find that accused has been unduly harassed by receiving a remedy he sought (a solution to the problem of the unsworn policeman); nor do I find anything in this record to suggest that the convening authority appointed a new court to help the prosecution—in a case that was going badly—by

giving it another opportunity, under more favorable circumstances, to convict the accused. *Gori* v. *United States,* supra.

It is when we approach the second assignment that I must part company with the majority of the Board. I feel that prejudicial error was committed by failure to comply with the Jencks Act with respect to the Hodges' tape.

Briefly, the facts which frame this issue follow: The Government called as its first witness at the second trial the co-actor, Airman Hodges. At the conclusion of his testimony on direct, defense moved for production of notes made by Mendelson and a tape recording taken by ONI Agent James during the interrogation of Hodges immediately following the incident. The law officer reviewed the pretrial investigation record concerning the notes and the recording, denied the motion to produce the notes on the ground that they did not constitute a "statement" within the meaning of the Jencks Act, but ordered production of the tape recording or show cause why it was unavailable.

Agent James testified unequivocally that he did make a tape recording of the Hodges interview—along with two "Augenblick" tapes—and that he took the three tapes to the ONI office which housed Mr. Mendelson. The latter was not there so he left the tapes with Mr. Fason, Mendelson's supervisor. Fason at first denied that the tapes were ever turned over to him, instead testified that they had been turned over to a Mr. Sginta. Subsequently, however, when the tapes were traced to him by other witnesses he recalled that James did turn the tapes over to him and that he had then turned them over to Mr. Mendelson.

Testimony was received that a search was unsuccessful in locating the Hodges tape; although the other

Augenblick tapes had been carefully preserved and were available.

When it was obvious that the Hodges' tape was not going to be produced and after it had been disclosed that the tapes had previously been in the possession of agent Mendelson (the principal investigating agent in this case) for months, the defense moved that Mendelson be called as a witness to testify concerning the tape. The law officer refused to require Mendelson's production as a witness on the basis that he had already testified extensively at the pretrial proceedings and would add little or nothing to that testimony, and the law officer also denied the defense motion to strike Hodges' testimony.

The Jencks Act, 18 U.S.C. 3500, established the procedures governing production of statements made by witnesses before United States courts, and it applies to all prosecutions brought by the United States.

Pursuant to the Act, the trial judge is required to order production by the Government of any statement of the witness in the possession of the United States, relating to the subject matter to which the witness has testified. If the Government elects not to comply with a court's order directing production, the trial judge must strike the witness' testimony or declare a mistrial if justice so dictates. 18 U.S.C. 3500 (b), (d).[1] Case law has interpreted the Act as placing upon the Government the burden of proving, once statements are shown to have been in existence, that they were

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[1] 18 U.S.C., section 3500(e)(2) defines a statement as:

"A stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

destroyed in good faith and in accord with normal business practices in order to escape the sanction of the Act. *Killian* v. *United States*, 82 S. Ct. 302; *United States* v. *Combs* 28 CMR 866.

As stated previously, Agent James testified repeatedly that he personally had taped the statement of Airman Hodges and that he had thereafter turned that tape—along with two other Augenblick tapes—over to Agent Fason. This testimony of a prosecution witness was forthright and unimpeached in any particular whatever. Agent Fason at first testified that he had directed that the tapes be turned over to Agent Scinta, but, subsequently, he changed his testimony and recalled that James had, as he testified, in fact given him the tapes, and that he, Fason, had turned the tapes over to Agent Mendelson.

It can hardly be disputed but that the Hodges' tape had in fact been in existence and that it was a produeible item under the Act. Mendelson when asked about the tape at the court of inquiry was very vague. He was "not certain" that a recording was ever made of the Hodges' interview, yet he knew Agent James was in the recording room at the time and that his only purpose for being there was obviously to record the Hodges' interview. Further, James testified that he bound the tapes together with a rubber band and turned them over to Agent Fason, who testified that he turned these same tapes over to Mendelson. Agent Carroll then testified that some months later Mendelson turned the Augenblick tapes over to him for safekeeping but that he did not know whether Hodges' tape was included. From the foregoing, it appears that the path of the Hodges' tape led directly to Agent Mendelson. The defense counsel urged that he be called to testify, noting that it was important that his credibility be weighed by the law officer and since there

had already been a change in Fason's testimony it was quite possible that Mendelson might change his and thus the mystery of the Hodges' tape would be cleared up.

It is important to keep in mind that Mendelson was one of the moving characters in this trial. He is the one who testified that he had taken a sworn statement from Officer Round, yet Round denied under oath that he ever swore to the statement, and it is significant that the subsequent testimony of both policemen was somewhat weaker than their purportedly sworn statements. Mendelson was also unusually vague about the recordings. It was important to the defense to have the recording of the initial interview of Hodges, a 20 year old, frightened enlisted man, being interviewed by two agents, with a third monitoring, in the early hours of the morning, especially since there are some indications in the record that at the very outset Hodges denied that "anything" happened. I feel that had Mendelson been called he might have been able to answer more specifically the question of what happened to the tape. Certainly he was available and the defense should have been given an opportunity to examine him on that issue. Since the law officer ruled that he would not strike Hodges' testimony in the absence of proof of wilful suppression of the recording, the defense was precluded testimony of the individual who was in charge of the investigation and in whose possession the recording had apparently rested. Under these circumstances, it was virtually impossible for the defense to have sustained the burden placed upon it. *Campbell* v. *United States*, 365 U.S. 85.

The question of what action should be taken when statements once available can no longer be produced was discussed by an Air Force Board of Review in

United States v. *Combs*, supra. According to the Board "ordinary prudence requires that if verbatim notes are made at all, they should be retained until final review of the case." Further, it was noted that since the Jencks decision (353 US 657) and statute, supra, had been expressly brought to the attention of all Air Force Judge Advocates, there exists a duty to preserve any statements until at least after it has been determined whether their production will be required at trial. The Board went on to remark that "The evidence establishes that the destruction or disposal of the stenographer's notes occurred as the result of negligence, rather than through an act of 'conscious' destruction, by the Government. Nevertheless, we cannot allow the intent of that law to be circumvented by such negligence." In addition "The Jencks decision and statute were aimed at preserving and perfecting the accused's rights to cross examination of prosecution witnesses on the basis of certain prior statements made by them. Here, the accused was precluded from examining such statements through the negligence of the Government."

The evidence in this record shows that in *fact*—and no doubt influenced by the Jencks Act—a careful procedure for the preservation of tapes had been worked out by the Office of Naval Intelligence until final disposition of the case. The record discloses that the tapes in question were carefully labeled and numbered by Agent James; that there was a designated custodian for them; and that the Augenblick tapes (excepting Hodges') were in fact carefully preserved and stored. Of all the tapes made in this case, it seems odd that only the tape of the principal prosecution witness, Hodges', suddenly comes up missing—the others being so carefully preserved. Under such circumstances, it is difficult to explain this mystery—in the absence of

deliberate destruction or gross negligence. Perhaps Mendelson would have explained how the tape could have been missing, outside these possibilities, since the tapes were in his possession, but he was not called specifically for that purpose.

I am not prepared to speculate, in view of Fason's change in testimony regarding Mendelson's possession of the tapes and Mendelson's vagueness about any tape being taken when he knew that James was in the sound room monitoring the interview, that Mendelson would not have added anything to his initial testimony. It is certainly a good possibility that his memory—like Fason's—would have been jogged into recollection by the testimony of the other witnesses.

I believe the Government should have the burden of proving that once statements are shown to exist that they were destroyed in good faith and in the routine course of business to avoid the Jencks Act. Here, it was clearly shown by the evidence that the routine course of business called for preservation of the tapes until final review. Accordingly, I would return the case for a rehearing.

Z. W. NEFF.

APPENDIX C

In the United States Court of Claims

No. 353-65

(Decided October 13, 1967)

KENNETH N. JUHL v. THE UNITED STATES

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, *Judges*.

OPINION

NICHOLS, *Judge*, delivered the opinion of the court:*

This is an action by Sergeant Juhl, an enlisted career man in the Air Force, to recover back pay and forfeitures he has lost as a result of his conviction, after trial, by a General Court Martial. His counsel asserts on his behalf that the conviction was contrary to the constitution and invalid on several grounds. We hold that the court martial lacked jurisdiction to convict because it was prohibited from so doing by Section 153a, Manual For Courts-Martial, 1951, which declares that "a conviction cannot be based" upon the "uncorroborated testimony of a purported accomplice," when such testimony

*This case was referred to Trial Commissioner C. Murray Bernhardt who submitted a proposed opinion, findings of fact, and a recommended conclusion of law, pursuant to the order of reference and Rule 57(a). We acknowledge great assistance from the proposed opinion but we reach the same result by a different route. We agree with the conclusion of law and adopt it as our own. We adopt the findings of fact with minor revisions, omitting, however, those that relate to the contents of *ex parte* affidavits before the Board for Correction of Military Records.

was "self-contradictory, uncertain or improbable." The conviction of Juhl was so based. In our opinion, the Congress in substance has declared that such a conviction would be fundamentally unfair. Therefore, it is exposed to collateral attack notwithstanding the statutory provisions for finality in 10 U.S.C. Sec. 876, Article 76 of the Act of May 5, 1950, Public Law 506, 81st Cong., 64 Stat. 108. This conclusion makes it unnecessary to consider other grounds the plaintiff relies on, and we do not do so.

To explain the basis of our conclusion it is necessary to consider the facts in some detail. We do not weigh the evidence in order to determine guilt or innocence but simply recite it to determine whether it includes anything that supports the result, within the rule referred to above.

The plaintiff before his conviction had the rank of Master Sergeant. His record included 23 years service in the armed forces and he had several decorations for bravery in action. He was an air policeman, apparently the equivalent of a military policeman in the Army. He was stationed at the R.A.F. air base at Lakenheath, England, which was at that time in use by the United States Air Force as an operating base. He had a number of air policemen serving under his command, including the purported accomplices subsequently mentioned.

The Air Force, like the other armed services, maintains exchanges on its bases on foreign territory where uniformed personnel and their dependents may purchase consumer articles, free of taxes and customs duties of every kind, including those of the United States and of the host country. This is an important fringe benefit, particularly for persons stationed in the United Kingdom, where the local taxes and duties on such articles as tobacco products and liquor are stiff. To avoid abusing the hospitality of the host country it was necessary for the Air Force to make certain that excessive quantities of AFEX (Air Force Exchange) merchandise did not find their way into the United Kingdom economy. To accomplish this, local Air Force regulations limited each airman and each dependent, e.g., to a quota of 4 cartons of cigarettes a month, with like quotas on other tobacco products and liquor. Each serviceman and each dependent had a ration card issued, which had to be stamped

and punched by the salesgirl at the AFEX on each purchase to show by how much the monthly quota was depleted. All personnel were forbidden to possess AFEX merchandise in excess of reasonable quantities, or to barter or sell such merchandise to persons not having such privileges. There was apparently no provision against giving AFEX merchandise away, and in light of this, the standards as to what quantities were reasonable to possess, at one time, were not clear. Apparently, it was, at least tacitly, permitted for persons having exchange privileges to purchase with other persons' ration cards as well as their own, purportedly to turn over the purchases so made to such other persons.

About June 1961 an informant, whose name does not appear in the case, disclosed to the Air Force that airmen were purchasing excessive quantities of AFEX merchandise and selling it to British civilians, at advances in price; in other words, they were maintaining a black market. Investigation soon implicated many persons, among whom were air policemen who should have been enforcing the law. Three persons in all informed against the plaintiff, of whom two were the purported accomplices who afterwards testified against him, and one testified but in his favor. Some of the accused airmen were tried and convicted by the British for offenses against their customs laws, and as to others, including plaintiff, the British executed a waiver which, in effect, surrendered them to their own Service for trial and punishment. Plaintiff's two purported accomplices, Airmen Shields and Hughes, were both already convicted and in custody when plaintiff was tried.

The charges and specifications served upon plaintiff in accordance with military procedure are set forth in full in the findings. Two of the specifications named Airman Shields as an accomplice. The evidence on these specifications was given to the Court Martial by Airman Shields and apparently was not convincing, as the tribunal acquitted plaintiff on these specifications. Therefore, they need not be considered further. Shields also gave, what might be called consciousness of guilt evidence, namely, an effort by plaintiff to get him to alter his testimony. Doubtless the Court Mar-

tial considered this as relating only to the specifications under which Shields was the accomplice.

The tribunal also acquitted the plaintiff of two other specifications where Airman Hughes was the purported accomplice. These included specifications that plaintiff purchased 6 transistor radios, in excess of reasonable amounts, and that he sold Air Force merchandise—two cartons of cigarettes—to an English civilian, a Charles R. Cox, who did not have exchange privileges.

The Court Martial convicted plaintiff of the remaining six specifications. It will be convenient first to consider specification 4 which charged him with acquiring cartons of cigarettes and boxes of cigars at the AFEX in an irregular manner. Hughes testified that he introduced plaintiff to certain British female employees of AFEX who thereafter, in his presence, contributed to plaintiff's making irregular purchases by not punching his ration card or, if someone was looking on, by punching through a hole that was already punched. The Air Force had written statements by both of the females which in general supported this charge. However, on the stand they testified they had made irregular sales to Hughes only, not plaintiff, and when plaintiff purchased in apparently large quantities, it was due to his presenting other persons' ration cards as well as his own. They explained the prior statements as due to pressure by investigators and fear of losing their jobs. They had lost their jobs anyway at the time of plaintiff's trial. The written statements were not received in evidence. It is clear that their evidence did not corroborate that of Hughes, unless contradiction is conceived to be corroboration.

Specification 7 stated that plaintiff, in conjunction with Hughes, transported 50 boxes of exchange cigars, in excess of reasonable amounts, between the Lakenheath base and Brandon, Suffolk, England. The testimony was as follows: Hughes testified that he and plaintiff traveled together, in a Volkswagen, owned by another airman, to a certain Airman Squire's home at Brandon, because Squire had told him that he had a customer who would buy the cigars. At Squire's home, Hughes and Squire removed the boxes from the boot or trunk (which, of course, in a Volkswagen is in

front). At the preliminary investigation under Article 32 of the Code, Hughes testified that plaintiff remained in the front seat of the car or stood beside it during the unloading. At the trial he testified that plaintiff acted as look-out on the road to be sure that no one surprised them. Plaintiff testified in his own behalf that he made the trip as alleged but knew and saw nothing of any contraband being in the car. Upon arrival at Squire's home he said he went to the front yard and sat with Mrs. Squire (it was June) having a drink of beer. He said that he could not possibly have seen anything coming on the road from where he was sitting. Squire testified for the prosecution but nevertheless stated that the arrangement to bring him the cigars was made with Hughes and the appearance of plaintiff surprised him; that he and Hughes unloaded the cigars from the car; that plaintiff sat, during that time, in the front yard with Mrs. Squire; and that plaintiff was in a position where he could not see the car or act as a look-out. A few days afterwards Squire heard of the investigation and threw away the cigars on a public road, so that they would not be found in his possession. He said nothing to implicate Juhl beyond his mere presence. There was no material variation in plaintiff's story and Squire's and nothing significant was brought out on cross-examination of plaintiff respecting this specification. Mrs. Squire did not testify; an affidavit she furnished later indicates she would not have corroborated Hughes if she had testified. When, as here, an accused testifies in his own behalf, he may of course, inadvertently corroborate the accomplice or make admissions that furnish corroboration. Nothing of the sort happened in this case.

Specification 3 charged that plaintiff, in conjunction with Hughes, sold 140 boxes of Air Force Exchange cigars to a person, not having exchange privileges, at Southend, Essex, England. Hughes testified to the occurrence of two transactions that would meet this description. He said an Airman Wainwright gave him a number to call at Southend, although in the preliminary investigation he had said that plaintiff had given it to him. Eventually he settled for the version that he and plaintiff jointly together got the number from Wainwright. Wainwright did not testify. He furnished an affi-

davit later which denied he ever gave a telephone number for such a purpose to anyone. After Hughes had called the number, on a Friday night, the next day, he testified, he and plaintiff drove in his Volkswagen to Southend, met their contact at a parking lot and went with him to a structure used by a dairy as a garage for milk trucks. There they transferred the cigars and received payment. The purchaser was not identified and did not testify. Obviously, the occurrence of this incident stands on the authority of the accomplice Hughes' testimony alone. Plaintiff denied that he participated in any such trip or transaction.

We now come to the most curious part of the case, the Southend trip of about a week later, June 17th. This time there were several others in the party and two cars were used. Hughes and his wife went ahead in his Volkswagen, taking their two dogs. (The dogs had been his daughters in the Article 32 investigation.) Plaintiff drove his car, a Chevrolet, and carried with him Mrs. Juhl, their four sons and an Airman Herron, in whose quarters the contraband had been kept the night before, so Hughes testified. The cigars, he said, travelled to Southend in plaintiff's trunk, or boot, under a blanket. Varying what he said at the Article 32 investigation, Hughes now said they had 20 transistor radios too. The whole party stopped on the way to Southend at an antique shop in a place called Sudbury, where they purchased a Life of Christ and two snake like candle holders with sharp points. They then continued to Southend where both cars stopped near a Chinese restaurant. According to Hughes, the two women took the children and the dogs into the restaurant. Plaintiff, Herron and he then travelled in plaintiff's car to the dairy garage, delivered the cigars, were paid, and returned to the restaurant. Plaintiff went in waving a big wad of English currency and handed some of it over to Mrs. Juhl. The ladies then went shopping and the men took the children to an amusement park. Southend is on the water and is a common resort for holiday making Londoners. In the late afternoon or evening they returned to the Base and had a snack there for supper. Plaintiff denied going to the dairy garage or anywhere else in his car after leaving the ladies at the restaurant. He said that the purpose for sepa-

rating before lunch was so that Hughes could walk the dogs, and that two of the boys were with them. After they had joined the ladies in the restaurant he gave Mrs. Juhl five pounds ($14.00) for shopping. Mrs. Juhl testified for the defense and supported her husband's version. The boys did not testify.

There was ample reason in the evidence to surmise that both Hughes' had in interest in obtaining a conviction. He had already been tried by Court Martial and sentenced, but by some contriving he was kept on the Base to do light office work, instead of the hard labor his sentence called for. He had been released from custody for Christmas. The inference was inescapable that the continued leniency of his future treatment was likely to be contingent on the conviction of his alleged accomplices. Under these circumstances, naturally, attention focuses on Airman Herron as the only disinterested adult, admitted by Hughes not to be a participant in the sale, even though Hughes had him providing stowage for the contraband the night before, and coming with them to the garage. Herron had been returned to a base in the United States shortly after this Southend trip. He had had correspondence with the defense and defense counsel, and the OSI had interviewed him. The defense requested that he be returned to Lakenheath as a defense witness and the Air Force ordered him there. He arrived in London one evening, was met by two representatives of the prosecution, and interviewed at length and until late. The following day he went on the stand. It was clear, therefore, that he would have had little or no opportunity to concert a story with the accused, plaintiff here, except by the risky method of written correspondence. He said he knew nothing of any contraband. His testimony affirmed the plaintiff in every detail and contradicted Hughes in every respect where his story differed from plaintiff's. He said that after the party had left Sudbury the children started playing with the candle holders. This their parents thought might be dangerous because of the spike points, so they stopped the car and Herron opened the trunk and put the candle holders in it. He saw no boxes of cigars and nothing was covered up by a blanket. So far as he was aware the trip was entirely what it purported to be, an innocent family outing.

Mrs. Hughes was put on the stand for rebuttal after the defense rested. Her story was partly favorable to plaintiff, in that he did not wave his English currency around when entering the restaurant as if bragging of a financial coup. Rather, he simply pulled a roll out of his pocket while seated, apparently, when Mrs. Juhl asked for money. (The Juhls' said they got English currency at the Base, and their purchases at Sudbury confirm they must have had some then.) One statement of Mrs. Hughes', ironically brought out by defense cross-examination, is the nearest thing to corroboration of Hughes the case affords. She said that when she was with Mrs. Juhl in the Chinese restaurant, before the men joined them, for some reason she looked out on the street and the plaintiff's car was gone. According to plaintiff and Herron, the car was not moved. She was, however, then or recently a German national and her mastery of English was imperfect. It was not clear whether the car had really been moved from where she had seen it parked or whether she had been uncertain as to its original location. There is no more dangerous witness than a foreign national whose English is only just good enough for him or her to be denied the help of an interpreter. The Law Officer made it of record (R 426) that she had difficulty understanding and was difficult to understand.

However, her testimony suffers from a more dramatic infirmity. It was brought out on cross-examination that she was living near the Base and when an air policeman went to pick her up to testify, Airman Hughes was with him. The policeman, Sergeant Stedley, overheard enough of the ensuing conversation and repeated it, to make it perfectly clear to us that Airman Hughes, in the guise of questioning her about her recollection of the Southend trip, was actually coaching her as to what to say. At the conclusion of Airman Hughes' testimony in Juhl's Court Martial the legal officer (*i.e.*, the judge) had given him the following instructions:

> LO: Airman Hughes, you are excused but subject to being recalled as a witness. You are instructed not to discuss your testimony in this case with anyone except counsel or the accused. You will not allow any witness in this case to talk to you about the testimony

which he has given or which he intends to give. If anyone other than counsel, these two captains here——

WITNESS: Right, sir.

LO: —— or the accused even attempts to talk to you about this case or about your testimony in this case, you should make the circumstances known to Captain Lee. (Captain Lee was the prosecutor.)

While there is no evidence that the prosecution ordered this flagrant violation of the court's instructions, it was in a position to see to it that they were observed, since Hughes was in custody, and manifestly it should have done so. Considering all the circumstances, we feel compelled to regard Mrs. Hughes' testimony as utterly devoid of probative value, at least as evidence for corroboration of Airman Hughes' testimony, since it is really Airman Hughes' testimony through another's mouth.

As in the case of Shields, Hughes testified to some statements by plaintiff possibly indicative of consciousness of guilt, but Juhl denied making such statements and they were not overheard by any impartial persons.

There were three other specifications not already mentioned, but the evidence to prove them was only the acts and transactions already described. Charge I, Specification 1 was conspiracy; Charge II, Specification 2 was for possession of Air Force Exchange merchandise, 140 boxes of cigars, in excess of reasonable amounts. This was apparently the same merchandise which plaintiff was charged with having sold in Specification 3. Charge II, Specification 9 was for dereliction in the performance of duties as noncommissioned officer in charge, in that plaintiff knew of black market activities by his subordinates and wilfully failed to apprehend them or report them. There was no evidence of plaintiff having such knowledge, except in the instances already described and those of which he was acquitted.

The requirement of corroboration does not mean that the corroborating evidence should cover every element of the offense so as to be sufficient for conviction apart from the accomplice's testimony. *Christy* v. *United States*, 261 F. 2d

357 (9th Cir. 1958), *cert. denied* 360 U.S. 919 (1959). In the circumstances, it should not consist merely of indifferent facts, but should in some manner connect the accused with the offense. *Arnold* v. *United States*, 94 F. 2d 499, 507 (10th Cir., 1938); *Kelliher* v. *United States*, 193 F. 8, 15–16 (1st Cir., 1912); *United States* v. *Howell*, 56 F. 21, 39 (W.D. Mo., 1892), *appeal dismissed*, 163 U.S. 690 (1896).

Corroboration cannot be found in the mere presence of the accused near the scene of the crime. *People* v. *Mullens*, 292 N.Y. 408, 416, 55 N.E. 2d 479, 482, motion denied, 293 N.Y. 768, 57 N.E. 2d 845 (1944); *O'Quinn* v. *State*, 43 Okla. Crim. 372, 279 P. 358 (1929). In the Brandon transaction there was corroboration that a crime was committed. The accused was admittedly near the scene of that crime, but his presence had an explanation consistent with innocence. If, *e.g.*, the car in the Brandon transaction had carried illicit heroin, corroboration might arguably be found—as the Government argues—in what might be thought the unlikelihood that the admitted offenders would allow anyone not having complicity to be or to travel with them during commission of the offense, with all the risk of exposing the crime accidently. Here, however, Hughes clearly did not see the cigars as dangerous in that way, as shown by his taking a non-participant (admitted by him to be such) with him in the second Southend transaction. In the absence of other corrroboration, it cannot therefore be found in Juhl's merely being near the cigars, which he said he was not aware of and did not see.

In the second Southend transaction, Juhl's story and Hughes', as we have seen, differed more widely. If Juhl told the truth, he did not deliver any contraband and neither did Hughes. No crime was committed. Conceding arguendo that corroboration might be found in any instance, however, minute, where testimony of others, or circumstances, confirmed Hughes' version and refuted Juhl's, there was no such instance except the tainted testimony of Mrs. Hughes. There was no corroboration that a crime was committed, still less that Juhl participated in committing it.

We have also considered whether Airman Hughes' testimony was self-contradictory and are of the view it was so beyond all doubt. When first suspected, Hughes was inter-

viewed by the OSI officers and denied all participation in black market activities. Later, on the 18th of July, he gave a statement to a Captain Miller in which he admitted black market activities on a large scale and implicated numerous persons, including plaintiff. At his Court Martial he again denied all participation in black market activities and claimed that his statement to Captain Miller had been obtained by improper coercion. At plaintiff's Court Martial Hughes blandly agreed that what he then testified to was entirely contrary to what he had said at his own trial, and he explained the latter as having been on the advice of some unnamed British lawyers. It is not clear whether these lawyers advised him to testify contrary to the truth or whether they based their advice on Hughes' own statements to them. If, however, it is thought that self-contradiction must be found within the four corners of the same proceeding, it should be noted that the proceeding in this, as in other Courts Martial, includes a preliminary investigation under Article 32 of the Code in which witnesses testify under oath. This is a discovery proceeding and the right of an accused to rely on any conflict between prosecution testimony there and at the trial is manifestly intended. There are in this case very important contradictions between Hughes' testimony in plaintiff's Article 32 investigation and that in plaintiff's trial. Thus there is contradiction whether the plaintiff Juhl or Airman Wainwright was the source from whom Hughes obtained the Southend contact's telephone number. There is self-contradiction as to whether they carried transistor radios as well as cigars on the second Southend trip. In his testimony about the Brandon trip there is self-contradiction whether the plaintiff sat in the car while the contraband was unloaded or acted outside it as a look-out. Squire's own testimony at the preliminary investigation had plaintiff out of and away from the car and that is undoubtedly why Hughes changed his version. It would appear, however, that if a person contradicts himself—anything he ever said—in his trial testimony, that testimony is self-contradictory. In ordinary speech the fact that a person contradicts himself is not limited as to time or transaction and there is nothing to show the requirement

of the Manual with respect to self-contradiction was not intended to be understood as it would be understood in ordinary speech. In *United States* v. *Haderlein*, 118 F. Supp. 346 (N.D. Ill., 1953), the testimony of an alleged accomplice was held to be self-contradictory by reason of conflicting testimony previously given under oath before a grand jury.

The Government cites the statement of a Board of Review in *United States* v. *Jones*, 15 CMR 664, 671 (1954), to the effect that testimony is not "self-contradictory" if the inconsistency is with statements made prior to the trial and the trial testimony itself is consistent; such prior statements are to be considered only in assessing the witness' credibility. The Board of Review cites no authority for this position. If it is valid, we believe its validity is limited to the case before the Board where, unlike the one at bar, the witness, in his testimony, does not expressly refer to his former statements and then expressly contradict them, that is, when one would have to go outside the witness' trial testimony itself to determine that he had contradicted himself. In any event, the Board of Review found no *significant* inconsistency in the testimony before it. It characterized the statements in question as "*minor* inconsistencies as to dates, places and circumstances pertaining to the offenses charged," *ibid.*, and said that the witnesses themselves had explained the inconsistencies away. In the case at bar that was not so. Here, as in *Haderlein*, *supra*, and unlike *Jones*, the utter inconsistencies of Hughes' prior sworn testimony was exposed and blithely admitted in Hughes' testimony at Juhl's trial itself. Other than *Jones*, no case pertinent to this issue has been cited to us. (Emphasis supplied.)

In a Military Court the function of the Law Officer, vis-a-vis the rest of the Court, much resembles that of the Judge in a civilian trial, vis-a-vis the jury. He admits or excludes evidence and instructs the president and other members of the court on the law just as a judge would do. The record in this case includes a conference about instructions between the Law Officer and counsel, out of the hearing of the rest of the court. The following colloquy occurred:

LO: It's my understanding, now, that the accused does does not want instruction on accomplice testimony.

DC: That is correct, sir. This was not the theory of the defense.

Defense counsel had, of course, laid great stress on impeaching the purported accomplices, Hughes and Shields, and apparently saw some inconsistency between his approach to the case and the instruction, whatever it was, that the Law Officer would have given. Defense counsel knew his way around court martials and his resourcefulness and zeal in behalf of his client were worthy of praise. Therefore, it is necessary to suppose he had in mind a purpose or reason the record now before us does not disclose. Apparently he had had an unrecorded conference with the Law Officer on the same subject. The record reflects a conscientious effort by the Law Officer to protect the rights of the accused and doubtless he would have delivered, if requested, an instruction built around Section 153a, only unfortunately he acquiesced in the theory that it was not required in the plaintiff's interest.

After the conviction of the plaintiff, as indicated, on 6 of the 10 Specifications, the Court Martial proceeded in due course to impose sentence which was that the accused would be reduced to the grade of airman basic, would forfeit $55.00 a month, and would be confined at hard labor for 6 months. He actually forfeited $43.00 per month, but he served most of the 6 months at hard labor.

The record before us includes an extended review of the case by a Staff Judge Advocate which was the nearest thing to appellate procedure that the plaintiff had a right to, or actually had. With regard to the accomplice rule all he says is the following:

> I note that no instruction on accomplice testimony was given. In view of the other instructions and the issues that were clearly drawn for the court's decision, no such instruction was necessary. Further, the defense specifically declined it (R. 454). The accused was not prejudiced by the fact that the instruction wasn't given.

It would appear to have been the position of the Staff Judge Advocate that the lack of instruction on accomplices was not prejudicial in view of the extended instructions on impeachment. The main thrust of the effort of defense counsel was to impeach the accomplice witnesses, Hughes and Shields. However, the absence of prejudice to the accused is by no

means as apparent to us. The purport of the accomplice rule is that a conviction upon the uncorroborated testimony of an accomplice, if the said testimony is "self-contradictory, uncertain or improbable," is not allowed. The effect of Hughes' self-contradictory statements, considered merely as impeachment, was that the triers of facts could choose whether or not to believe what he said before them, *i.e.*, they could decide whether the witness was, in fact, impeached or not (R 459, 468). The effect of the accomplice rule would seem to be that in a case covered by the rule the determination of guilt would have to be taken away from the fact-finders and they could not render a verdict of guilty whether they believed Hughes was telling the truth now or had told it before.

That is one reason why in this case counsel's refusal of an instruction on accomplice testimony did not constitute a waiver of the point. If, as we hold, judgment in favor of the plaintiff should have been directed by the law officer on this ground, there was no need or place for an instruction which would have left it up to the court-martial members to decide for themselves whether or not Hughes' testimony was corroborated and if not whether or not it was "self-contradictory, uncertain, or improbable." Under our view of the case these were not issues to be given to the fact-finders. Neither plaintiff or his counsel ever indicated that they were deliberately waiving application of the accomplice rule by the law officer.

The appellate review within the military system does not appear to have been such as to require us to keep hands off under the standards set forth in *Burns* v. *Wilson*, 346 U.S. 137, 144 (1953), that is, that we would be going over matters they have fully considered.

In case of mere error, in admitting or excluding evidence or instructing a jury, the failure of counsel to object of course has the normal consequence of barring even a direct appellate reversal, and this holds good as to collateral attack on a court martial when the ground of attack is failure to give full and fair consideration to procedural safe-guards deemed essential to a fair trial. *Bennett* v. *Davis*, 267 F. 2d 15 (10th Cir., 1959). The rationale is that the tribunal cannot be said to have "refused to consider" a point not urged.

Bishop, *Civilian Judges and Military Justice: Collateral Review Of Court-Martial Convictions*, 61 Col. L.R. 40, 62 (1961). Here, however, the defect is, we believe, jurisdictional on other grounds, as we will show, and the normal rule applies that a jurisdictional defect cannot be cured by waiver. *McClaughry* v. *Deming*, 186 U.S. 49, 66 (1902).

For full understanding the accomplice rule should be considered in context and for this reason we attach the whole of Section 153a of the Manual to this opinion as Exhibit A.

The plaintiff applied to the Air Force Board For Correction of Military Records, after the completion of standard military review procedures. The Board considered evidence against the plaintiff which the Court Martial had excluded as illegally acquired, namely plaintiff's ration card exhibiting irregular punches which may or may not have been over-punches. On the other hand, it also received various affidavits on behalf of plaintiff which purported to amplify, vary, or explain the evidence at the trial, along the lines of plaintiff's contentions. The decision of the Board was adverse to the plaintiff, but it did not make part of the record any indication of how it evaluated the original or new evidence, or what its reasons were. In the circumstances, we cannot given the Board decision weight against the plaintiff here, or accept it as the previously unprovided appellate review. Plaintiff in argument called attention to the cases in which we have overturned Board decisions which we have found arbitrary, capricious, or not supported by substantial evidence. The argument seemed to be, along the lines of *Ashe* v. *McNamara*, 355 F. 2d 277 (1st Cir., 1965), that this judicial power in some manner overrides the finality language of the Uniform Code of Military Justice, 10 U.S.C. 876. We consider later what effect this finality language has on the scope of our review of the Court Martial itself. Suffice it to say at this point we do not think the finality, whatever it is, is either enhanced or diminished by the Board proceedings. The case stands before us exactly as if plaintiff had never gone to the Board. It is not arbitrary and capricious, in the absence of unusual circumstances not here present, to consider *ex parte* affidavits of less weight than testimony taken subject to cross-examination.

We have now determined that Section 153a of the Manual For Courts Martial, 1951, provides that no person may be convicted on the uncorroborated testimony of an accomplice if such testimony is self-contradictory. We have further established that the plaintiff Juhl was convicted on the uncorroborated testimony of a purported accomplice. We have further established that the testimony of the purported accomplice was self-contradictory. We have noted that counsel did not request and the Law Officer did not give instruction on this accomplice rule. What remains to be determined is what effect we can give to the foregoing in view of the provision in 10 U.S.C. 876, that the determination of courts martial under the Code of Military Justice shall be final and not subject to question in any court except the courts set up by the Code itself.

Our recent decision in *Augenblick* v. *United States*, 180 Ct. Cl. 377 F. 2d 586 (1967), takes us part of the way by demonstrating that the Congress clearly indicated in the legislative history that it did not intend to reduce or enlarge the traditional limited collateral attack on courts martial in habeas corpus proceedings, and further, inasmuch as back pay suits in this court had enjoyed equality with habeas corpus as a means of collateral attack almost ever since the first existence of this court, the Congress could not have intended, the legislation not mentioning either, to abolish one and not the other. The reference to habeas corpus in the legislative history must have been demonstrative and not exclusionary. There is, of course, nothing unheard of in statutory finality language not having in court proceedings its exact literal effect. *Ashe* v. *McNamara*, *supra*, at 281, and cases cited. Therefore, we reiterate that whatever scope of review would be proper, in view of the finality language, in a habeas corpus proceeding, is equally appropriate in a suit in this court for back pay.

The Manual for Courts Martial is not an ordinary handbook. The Uniform Code of Military Justice, *supra*, Article 36, *supra*, reads in part as follows:

> The procedure, including modes of proof, in cases before courts-martial, * * * may be prescribed by the President by regulations which shall, so far as he con-

> siders practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, * * *

All regulations under this authority were to be reported to Congress. President Truman by Executive Order 10214, 3 CFR, 1949–1953 Comp., p. 408, invoking this authority, promulgated and prescribed the Manual referred to. There can be no doubt he had in mind that failure to comply with regulations might render a proceeding invalid because there is a clause in the order which reads as follows:

> * * * Provided, That nothing contained in this manual shall be construed to invalidate any investigation, trial in which arraignment has been had, or other action begun prior to May 31, 1951; * * *

The Congress had in mind that failure to comply with some other provisions of the Uniform Code would or might be a basis of collateral attack, for it expressly declared that failure to follow Article 32 (Investigation), 10 U.S.C. § 832, "does not constitute jurisdictional error." 10 U.S.C. § 832(d).

The manual is a lengthy and formidable document and it would boggle the imagination to suppose that a court martial should be totally invalid for failure to comply with any part of any provision. However, few provisions contain language as strong as the accomplice provision here under consideration. That is, few provisions say as this one does that "a conviction cannot be based" on procedure not in compliance with the rule stated. This appears to indicate plainly that power to convict in violation of this rule is not granted. It is not a mere rule of evidence or procedure.

Duly authorized regulations for the conduct of court martials have the force of law. *Ex parte Reed*, 100 U.S. 13, 22 (1879). Counsel referred to the accomplice rule as a "statute" in oral argument and the deviation from strict accuracy was immaterial.

Collateral attacks in civilian courts upon court martials have been common for over 100 years in our jurisprudence, and it is important now to consider the effect in such a collateral attack of a violation by a court martial of a statute fashioned to govern its procedure.

It is a commonplace that the historic attitude of United States civilian courts was that they could not review court martial proceedings for legal error, but only for lack of jurisdiction. *Carter* v. *Roberts*, 177 U.S. 496, 498 (1900); *Swaim* v. *United States*, 165 U.S. 553, 561 (1897); *Collins* v. *McDonald*, 258 U.S. 416, 418 (1922); *Carter* v. *McClaughry*, 183 U.S. 365, 381 (1902); *In re Grimley*, 137 U.S. 147, 150 (1890); *Hiatt* v. *Brown*, 339 U.S. 103, 111 (1950); *United States* v. *Fletcher*, 148 U.S. 84, 92 (1893). In *Collins* v. *McDonald*, *supra*, at 420-21, it was held that the admission, by a court martial, of a confession obtained by duress, was a mere error in admission of testimony which could not be reviewed on habeas corpus, when the accused made no reference to the record to support the assertion of duress. *Hiatt* v. *Brown*, is a particularly interesting illustration of the general rule and had the concurrence of all the justices who participated, an unusual circumstance in Supreme Court cases dealing with courts martial at that period. The Fifth Circuit below, 175 F. 2d 273 (1949), had held that the conviction was unconstitutional as contrary to due process because of a group of errors which the court basketed to add up to a constitutional deprivation. The errors were as follows:

> "(1) Accused was convicted on the theory that although he was on duty as a sentry at the time of the offense, it was incumbent upon him to retreat from his post of duty.
>
> "(2) Accused has been convicted of murder on evidence that does not measure to malice, premeditation, or deliberation.
>
> "(3) The record reveals that the law member appointed was grossly incompetent.
>
> "(4) There was no pre-trial investigation whatever upon the charge of murder.
>
> "(5) The record shows that counsel appointed to defend the accused was incompetent, gave no preparation to the case, and submitted only a token defense.
>
> "(6) The appellate reviews by the Army reviewing authorities reveal a total misconception of the applicable law." 175 F. 2d at 277.

The Supreme Court said at p. 111:

> It is well settled that "by *habeas corpus* the civil courts exercise no supervisory or correcting power over the proceedings. * * *. The single inquiry, the test, is juris-

diction." * * *. In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful *powers*. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision. * * *. (Emphasis supplied.)

In the instant case, the mandatory corroboration requirement of § 153a, of the Manual, clearly shows Congress' intention to withhold from a court-martial the *power* to convict where that standard has not been met. The standard not having been satisfied here, the court-martial lacked the power necessary to convict the plaintiff.

There exists an ancient and respectable doctrine that a court-martial will lose its jurisdiction by failure to follow applicable statutory procedure. In *Dynes* v. *Hoover*, 20 How. (61 U.S.) 65, 81 (1857), the Court said:

> * * * When [the court martial sentence is] confirmed, it is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case in which the court had not jurisdiction over the *subject-matter or charge*, or one in which, having jurisdiction over the subject-matter, it has failed to observe the rules prescribed by the statute for its exercise. * * *

The Court had previously indicated, at p. 80, that the court martial is a kind of inferior court and where it "has jurisdiction over the subject-matter, *but is bound to adopt certain rules in its proceedings, from which it deviates, whereby the proceedings are rendered coram non judice*," a proper method of collateral attack was a personal action against the officer who executed the process of the tribunal.

In *Runkle* v. *United States*, 122 U.S. 543, 556 (1887), the Court said:

> To give effect to its [a court martial's] sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law.

In *McClaughry* v. *Deming*, *supra*, at p. 63, the Court said:

> "A court-martial organized under the laws of the United States is a court of special and limited jurisdic-

tion. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved. 3 Greenl. Ev. sec. 470; *Brooks* v. *Adams*, 11 Pick 441, 442; *Mills* v. *Martin*, *supra*; *Duffield* v. *Smith*, 3 S. & R. 590, 599. Such, also, is the effect of the decision of this court, in *Wise* v. *Withers*, 3 Cranch, 331, which, according to the interpretation given it by Chief Justice Marshall in *Ex parte Watkins*, 3 Pet. 193, 209, ranked a court-martial as 'one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally.' To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law. *Dynes* v. *Hoover*, 20 How. 65, 80; *Mills* v. *Martin*, 19 Johns. 33. There are no presumptions in its favor, so far as these matters are concerned. * * *."

It is true that among these early cases, instances are not often found of successful collateral attack by reason of violation of applicable statutory regulations. However, in *Smith* v. *United States*, 38 Ct. Cl. 257 (1903), we held, citing *Runkle* v. *United States*, *supra*, in a back pay suit that the court martial was void because, contrary to a statutory requirement, the accused had not been served with a copy of the charges and specifications upon his first arrest. The Supreme Court reversed at 197 U.S. 386 (1905), but upon the ground that we misconstrued the statute. It expressly passed over the jurisdiction issue. It would seem the case stands as a valid precedent in this court on the jurisdictional question, the reversal having been on other grounds. In *Mullan* v. *United States*, 42 Ct. Cl. 157 (1907), aff'd. 212 U.S. 516 (1909), we said (at p. 177) (concerning a statute requiring court-martials to confront the accused with the witnesses against him, which right he had waived):

> The statute in question is not in any manner a limitation upon the jurisdiction of the court-martial. The authority of the tribunal is not prescribed by its terms. It is merely a legal regulation as to its proceedings securing certain rights to the accused, which in the absence of an express waiver upon his part, must be accorded him by the tribunal or *subject their findings or sentence to collateral attack in civil courts*, and as such we have treated it. * * * (Emphasis supplied.)

In *Humphrey* v. *Smith*, 336 U.S. 695 (1949), the Court held that failure to conduct a proper pre-trial preliminary investigation did not go to the jurisdiction when the trial itself was fair. Three judges dissented and would have held that the omission of a proper statutory preliminary investigation was jurisdictional. It would appear a reasonable inference from the conclusion of the majority that they would have seen the defective procedure as jurisdictional if they had thought it tainted the fairness of the trial itself. Article 32 of the Uniform Code, 10 U.S.C. 832, now expressly declares that this kind of error shall not be jurisdictional.

From the cases up to that point the Congress and the President might well have been on notice that any regulations issued under Article 36, *supra*, might be held to prescribe procedure which or some of which would have to be complied with for the court martial to stand up against collateral attack. The paucity of instances under previous law of successful attack on the ground of failure to comply with a statute or a Presidential regulation might have been deemed attributable to the fact that such statutory procedures were few and simple and were not burdensome to comply with.

The challenge of a court martial for failure to follow a statute fashioned to govern it thus would seem to have better historic foundation than its challenge on merely constitutional grounds. Only in 1947 had come *Shapiro* v. *United States*, 107 Ct. Cl. 650, 69 F. Supp. 205, which seems to have been somewhat of an innovation as the first successful collateral attack on a court martial for breach of the Bill of Rights. In *Burns* v. *Wilson*, *supra*, Mr. Justice Frankfurter refers to the case in a separate comment at pps. 844 and 847 of the same volume and laments that it was not called to the Supreme Court's attention by the parties in their briefs. The Justices in the latter case went off in different directions and no opinion commanded the support of a majority. Mr. Justice Minton invoked the old rule limiting collateral attack to jurisdictional issues, citing *In re Grimley*, *supra*, and *Hiatt* v. *Brown*, *supra*, but failed to note how *Grimley* was, among the older cases, representative of one side of the range and not the median. The opinion of the Court, so called, per Mr. Chief Justice Vinson, sustaining the court martial, pronounced doctrines which in a way may be considered to

have started a new line of jurisprudence. They point out the separate nature of military law, the need of the military for strict discipline, and the fact that civilian courts lacked supervisory powers in the field. They expressed the view that the habeas corpus jurisdiction was less than that over civilian courts. They looked hopefully at the prospects of the new Uniform Code of Military Justice. They pointed out the finality provision in the Code, but expressed the opinion that it did not relieve the civilian courts of the duty to take corrective action in cases of fundamental unfairness and violations of the constitution. However, the civilian courts should not reweigh issues which military courts have dealt with fairly and fully.

Mr. Justice Frankfurter thought the case should be reargued. Mr. Justice Jackson concurred in the result and two Justices dissented.

Succeeding decisions in this court, *Shaw v. United States*, 174 Ct. Cl. 899, 357 F. 2d 949 (1966), and *Augenblick*, *supra*, have developed the themes of constitutional deprivation and fundamental unfairness. Nothing in these cases should be taken, as authority that a constitutional deprivation has to be found to maintain a collateral attack, when such an attack would have been maintainable without constitutional grounds before 1950. *Augenblick*, involved a violation of the Jencks Act which is of general application. There may be a valid distinction between statutes of general application and those fashioned directly for courts martial. At any rate, we found a constitutional issue in *Augenblick*, so we placed the case in the mainstream of these recent decisions.

Express statutory provisions to assure fairness in court martials were long the only "bill of rights" an accused soldier could rely on. Only later, much later, did it become possible to him to invoke the constitutional Bill of Rights on matters wherein the statutes were silent. It is entirely logical and consistent therefore, when the text and context of the statute permits, that in a collateral attack breach of such an express statutory provision has the same legal consequence as breach of the constitutional bill of rights does when the statute is silent.

The Mannall's accomplice rule, which we apply here, goes to the basic fairness of the trial in that it deals with the ex-

istence of any probative evidence sustaining the conviction. To assure that convictions stand upon truly probative evidence, the President has directed that "a conviction cannot be based" on a record failing to meet the accomplice rule. In its relation to fundamental fairness, this rule is similar, and serves a parallel purpose, to the constitutional rule that the due process clause invalidates a conviction rested on no evidence at all. *Thompson v. City of Louisville*, 362 U.S. 199 (1960); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965).

Since his conviction was thus invalid, plaintiff is entitled to recover back pay and allowances, less appropriate offsets, from the date on which the pay and allowances were withheld to the date of judgment. Judgment is entered for plaintiff to that effect. The amount of recovery will be determined under Rule 47(c).

FINDINGS OF FACT

The court having considered the evidence, the report of Trial Commissioner C. Murray Bernhardt, and the briefs and arguments of counsel, makes findings of fact as follows:

I—PRETRIAL

1. Discovery and scope of black-marketing activities. Early in July 1961 the Office of Special Investigations (OSI) of the Air Force informed Captain Kenton D. Miller, commanding officer of the 49th Air Police Squadron, 49th Air Base Group, RAF Station, Lakenheath, England, that a number of his enlisted men had been engaged in the black-marketing of Air Force Exchange merchandise (principally cigarettes, cigars, liquor, and transistor radios) to unauthorized British civilians in violation of military regulations as well as the customs laws of England. In the course of his investigation of these reports Captain Miller interrogated about 80 enlisted men in his squadron and concluded that about 49 squadron personnel were involved in such prohibited activities, of whom ten were under the immediate supervision of plaintiff, who was then a master sergeant and Noncommissioned Officer in Charge (NCOIC) of Security and Law Enforcement at the base, with 25 or 30 enlisted men in his unit. As part of Captain Miller's investigation, on July 18,

1961, he interrogated Airman Basic Frank W. Hughes, who orally accused 29 men in the squadron of being involved in black-marketing. Eventually ten of these 29 men received punishment either following conviction in British courts for violations of British customs laws, or following military proceedings under Article 15 or courts-martial. Just how many of these ten men convicted were under plaintiff's direct supervision is not revealed in the record, but there were at least four. Of the 60 men interrogated by Captain Miller, three implicated the plaintiff directly. These were Airmen Hughes, Larry Ray Shields, and Wallace Dale Squire. Plaintiff testified that until July 18, 1961, when the scandal broke, he was not aware of black-marketing activities by the airmen in his unit.

2. Plaintiff's background and character.

Plaintiff (sometimes hereafter referred to as the "accused") was born March 6, 1921, enlisted in the regular army March 8, 1939, and served as an enlisted man until January 22, 1945, when he was commissioned a second lieutenant in the Army of the United States, and so served until October 27, 1946. He reenlisted on November 14, 1946, and has continued in this enlisted status to the present time. He arrived at Lakenheath in England September 18, 1959, and served there in the rank of master sergeant as NCOIC of Security and Law Enforcement of the 48th Air Police Squadron until July 18, 1961. He was on the board of governors of the NCO Club, and an active member of the pistol team. The character of his service just prior to his court-martial conviction was officially rated as "outstanding". In addition to numerous campaign and theater ribbons, a good conduct medal, and other unit and personal decorations, he was awarded the Silver Star and Bronze Star Medal (with Oak Leaf Cluster) for gallantry and heroic action in combat in Germany during the closing stages of World War II. At his trial four master sergeants and two staff sergeants who had known plaintiff for several years testified to his good character and reputation for truth and veracity. Prior to plaintiff's involvement in the court-martial proceeding his commanding officer, Captain Miller, who had served over plaintiff for two years and knew him well, regarded him as outstanding, dependable, tough, and honest. Plaintiff was in fairly good

financial condition in 1961. He owed no debts and owned two homes in the United States which were being rented out.

3. Plaintiff's initial arrest and confinement. On July 18, 1961, plaintiff was arrested without charges and confined overnight by order of Captain Miller. He was released from confinement the following day but was relieved of his duties and assigned to laboring chores on the base far below his master sergeant's rank pending investigation of statements implicating him in black-marketing. He and his family, consisting of a wife and four sons, had been living off the base, but on August 11, 1961, he was required to move into quarters on the base. Thereafter until his court-martial trial ending February 2, 1962, he was assigned to unimportant duties and restricted to residence at the base.

4. Consultation with Staff Judge Advocate. At all material times Major (later Lieutenant Colonel) Clifford R. Carver was Staff Judge Advocate at Lakenheath. On or about August 10, 1961, plaintiff visited Major Carver to obtain advice and to ascertain the details of statements which he understood had been made by others implicating him in black-marketing activities. He did not ask Major Carver to provide counsel, and Major Carver did not volunteer that plaintiff had any right to counsel at that time. He told plaintiff that he would inform plaintiff when he should engage counsel, and that in the meantime he was not to talk to lawyer-officers on his (Carver's) staff until Carver found "which way the wind was blowing." Plaintiff told Major Carver that he did not intend to make a statement regarding the allegation implicating him in illegal activities, for his experience as an Air Policeman led him to think this to be inadvisable as a general proposition. Major Carver subsequently drafted the formal charges against plaintiff, prepared the first posttrial interview report following plaintiff's conviction by general court-martial on February 2, 1962, in which report he recommended approval of the sentence of the court-martial as adjudged, and had earlier restricted plaintiff to the base while he was under investigation as a suspect or as a material witness against others. There is no indication that Major Carver interrogated plaintiff at any time as to the facts concerning his guilt or inno-

dence, or that he was biased against plaintiff as the latter alleged in a clemency statement which he filed on March 27, 1962, following his court-martial conviction. Major Carver certified that he had not "participated in the trial of this case [i.e., plaintiff's court-martial] as counsel, a member of the court, the accuser, as a witness, or in any other capacity of a partisan nature. My only connection with the case has been that of Staff Judge Advocate to the Officer exercising Special Court-Martial authority over the accused."

8. Participation of Captain Lee, Trial Counsel.

Airman Hughes (*supra*, finding 1) was tried by court-martial on November 2, 1961, with Captain Richard R. Lee prosecuting the case as Trial Counsel. In late October 1961 Captain Lee called in plaintiff to confer with him as a prospective witness against Hughes; no charges had by then been served on plaintiff.

Captain Lee later prosecuted plaintiff as Trial Counsel in plaintiff's court-martial. It is not indicated that, in the conferences between Captain Lee and plaintiff, or in a conference between Captain Lee and plaintiff's wife, any admissions damaging to plaintiff or his wife were made by them which were prejudicial to plaintiff at his subsequent trial. Plaintiff did not consult Captain Lee as his attorney and Captain Lee gave him no legal advice.

9. Article 32b Investigation. Statements were obtained from prospective or potential prosecution witnesses on or about July 18, 1961. Plaintiff was arrested on that day without charges, and released the next day. Thereafter he was restricted to the base through the time of his court-martial trial ending February 2, 1962. Charges were preferred against plaintiff on November 29, 1961, with Major Edwin L. Atkins as the accuser. On November 29, 1961, an Article 32b Investigation convened attended by Lieutenant Maurice E. Hebert as Investigating Officer, the plaintiff, and a reporter. Lt. Hebert informed the plaintiff as to his rights, read the charges to him, and proffered him military counsel or selection of a counsel of his choice. Plaintiff requested Captain Ginsburg for his military counsel, and the Article 32b Investigation then recessed to December 18, 1961, to provide plaintiff an opportunity to secure the services of Captain Ginsburg as his military counsel. The Arti-

cle 32b Investigation reopened December 18, 1961, attended by Lt. Hebert, a reporter, plaintiff and his defense counsel, Captain Gordon A. Ginsburg. Seven witnesses were examined by Lt. Hebert and cross-examined by Captain Ginsburg. The investigation was then closed. The plaintiff was given a delay to January 18, 1962, for further investigation. On January 8, 1962 the Article 32b Investigation was reopened and testimony was taken from additional witnesses. Formal charges were served on plaintiff on January 18, 1962. The court-martial convened January 30, 1962, and trial opened.

7. Charges and specifications. The charges and specifications served on plaintiff on January 18, 1962, were as follows:

CHARGE I: Violation of the Uniform Code of Military Justice, Article 81.

Specification: In that MASTER SERGEANT KENNETH N. JUHL, United States Air Force, 48th Supply Squadron, 48th Air Base Group, did, at Royal Air Force Lakenheath, Suffolk, England, on or about 25 May 1961, conspire with AIRMAN FIRST CLASS FRANK W. HUGHES to commit an offense under the Uniform Code of Military Justice, to wit: Violation of paragraph 51.1.c, United States Air Forces in Europe Supplement 1 to Air Force Regulation 147-14, dated 15 November 1960, and in order to effect the object of the conspiracy the said Sergeant Juhl and Airman Hughes transported Air Force Exchange merchandise (140 boxes of cigars) to Southend, Essex, England, during the period of 25 May 1961 to 24 June 1961.

CHARGE II: Violation of the Uniform Code of Military Justice, Article 92.

Specification 1: In that MASTER SERGEANT KENNETH N. JUHL, United States Air Force, 48th Supply Squadron, 48th Air Base Group, did, at Royal Air Force Lakenheath, Suffolk, England, on or about 18 May 1961, violate a lawful general regulation, to wit: paragraph 51.1.b, United States Air Forces in Europe Supplement 1 to Air Force Regulation 147-14, dated 15 November 1960, by purchasing Air Force Exchange merchandise (six transistor radios) in excess of reasonable amounts.

Specification 2: In that MASTER SERGEANT KENNETH N. JUHL, United States Air Force, 48th Supply Squadron, 48th Air Base Group, did, at South-

end, Essex, England, from about 25 May 1961 to about 24 June 1961 in conjunction with AIRMAN FIRST CLASS FRANK W. HUGHES, violate a lawful general regulation, to wit: paragraph 51.1.b, United States Air Forces in Europe Supplement 1 to Air Force Regulation 147-14, dated 15 November 1960, by possessing quantities of Air Force Exchange merchandise (140 boxes of cigars) in excess of reasonable amounts.

Specification 3: In that MASTER SERGEANT KENNETH N. JUHL, United States Air Force, 48th Supply Squadron, 48th Air Base Group, did, at Southend, Essex, England, from about 25 May 1961 to about 24 June 1961, in conjunction with AIRMAN FIRST CLASS FRANK W. HUGHES, violate a lawful general regulation, to wit: paragraph 51.1.c, United States Air Forces in Europe Supplement 1 to Air Force Regulation 147-14, dated 15 November 1960, by selling Air Force Exchange merchandise (140 boxes of cigars) to a person not having exchange privileges.

Specification 4: In that MASTER SERGEANT KENNETH N. JUHL, United States Air Force, 48th Supply Squadron, 48th Air Base Group, did, at Royal Air Force Lakenheath, Suffolk, England, from about 1 April 1961 to about 18 July 1961, violate a lawful general regulation, to wit: paragraph 51.1.h, United States Air Forces in Europe Supplement 1 to Air Force Regulation 147-14, dated 15 November 1960, by wrongfully acquiring Air Force Exchange merchandise (cartons of cigarettes and boxes of cigars) in an irregular manner.

Specification 5: In that MASTER SERGEANT KENNETH N. JUHL, United States Air Force, 48th Supply Squadron, 48th Air Base Group, did, at Southend, Essex, England, on or about 15 July 1961, in conjunction with AIRMAN SECOND CLASS LARRY R. SHIELDS, violate a lawful general regulation, to wit: paragraph 51.1.c, United States Air Forces in Europe Supplement 1 to Air Force Regulation 147-14, dated 15 November 1960, by selling Air Force Exchange merchandise (6 cartons of cigarettes and 12 boxes of cigars) to a person not having exchange privileges.

Specification 6: In that MASTER SERGEANT KENNETH N. JUHL, United States Air Force, 48th Supply Squadron, 48th Air Base Group, did, at Royal Air Force Lakenheath, Suffolk, England, on or about 14 July 1961, in conjunction with AIRMAN SECOND CLASS LARRY R. SHIELDS, violate a lawful general regulation, to wit: paragraph 14a, United States Air Forces in Europe Regulation 176-1, dated 22 April

1960, by transferring Class VI items (eight bottles of gin) to a person not authorized Class VI privileges.

Specification 7: In that MASTER SERGEANT KENNETH N. JUHL, United States Air Force, 48th Supply Squadron, 48th Air Base Group, did, on or about 15 July 1961, in conjunction with AIRMAN FIRST CLASS FRANK W. HUGHES, violate a lawful general regulation, to wit: paragraph 51.1.b, United States Air Forces in Europe Supplement 1 to Air Force Regulation 147–14, dated 15 November 1960, by transporting quantities of Air Force Exchange merchandise (50 boxes of cigars) in excess of reasonable amounts between Royal Air Force Lakenheath, Suffolk, England, and Brandon, Suffolk, England.

Specification 8: In that MASTER SERGEANT KENNETH N. JUHL, United States Air Force, 48th Supply Squadron, 48th Air Base Group, did, at Royal Air Force Lakenheath, Suffolk, England, on or about 1 April 1961, in conjunction with AIRMAN FIRST CLASS FRANK W. HUGHES, violate a lawful general regulation, to wit: paragraph 51.1.c, United States Air Forces in Europe Supplement 1 to Air Force Regulation 147–14, dated 15 November 1960, by selling Air Force Exchange merchandise (two cartons of cigarettes) to Charles R. Cox, a person not having exchange privileges.

Specification 9: In that MASTER SERGEANT KENNETH N. JUHL, United States Air Force, 48th Supply Squadron, 48th Air Base Group, at Royal Air Force Lakenheath, Suffolk, England, from about 1 April 1961 to about 18 July 1961, was derelict in the performance of his duties as Non-Commissioned Officer in Charge, Law Enforcement Section, 48th Air Police Squadron, 48th Air Base Group, in that he had knowledge that subordinate Air Policemen under his supervision were regularly engaged in the violation of paragraph 51.1, United States Air Forces in Europe Supplement 1 to Air Force Regulation 147–14, dated 15 November 1960, by purchasing Air Force Exchange merchandise for purpose of resale and the production of income, by purchasing, possessing and transporting of quantities of Air Force Exchange merchandise in excess of reasonable amounts, by selling Air Force Exchange merchandise to persons not having Exchange privileges, and by acquiring Air Force Exchange merchandise.

II—TRIAL

8. Convening of general court-martial; motions to dismiss.

a. Immediately after the plaintiff's general court-martial convened on January 30, 1962, it recessed briefly for the Law Officer to entertain defense counsel's motions to dismiss all charges and specifications on the following three grounds:

(1) Deprivation of speedy trial.

(2) Defective charges and specifications.

(3) Violation of Canon 9 of the Canons of Ethics of the American Bar Association, in that Trial Counsel Lee (the prosecuting officer), prior to his appointment as such, interviewed the accused on matters pertaining directly to his prospective defense against charges not then preferred.

b. All motions to dismiss were overruled by the Law Officer. In presenting arguments in support of the third motion to dismiss (subparagraph (3) above), defense counsel interrogated the accused and Trial Counsel Lee out of the presence of the court-martial, and they were cross-examined.

9. Verdict and sentence.

a. After 478 pages of trial transcript of testimony and arguments taken from January 30, 1962 to February 2, 1962, the court on the latter date found the accused (plaintiff here) guilty of Charge I and Specification 1 thereunder, guilty of Charge II and Specifications 2, 3, 4, 7 and 9 thereunder, and not guilty of Specifications 1, 5, 6 and 8 of Charge II. Reference to the Charges and Specifications set forth in finding 7, *supra*, reveals that in paraphrased parlance the plaintiff was found guilty of the following:

(1) Possessing, transporting and selling, in conjunction with Airman Hughes, 140 boxes of cigars acquired from the Air Force Exchange in excess of reasonable amounts, to an unnamed unauthorized person in Southend, England, between May 25 and June 24, 1961, in violation of Articles 81 and 92, Uniform Code of Military Justice. (Specification 1 of Charge I, and Specifications 2 and 3 of Charge II).

(2) Wrongfully acquiring Air Force Exchange merchandise (cigars and cigarettes) in an irregular manner from April 1 to July 18, 1961. (Specification 1 of Charge II).

(3) Transporting, in conjunction with Hughes, 50 boxes of Air Force Exchange cigars, to Brandon, Suffolk, England, on July 15, 1961. (Specification 7 of Charge II).

(4) Dereliction of duty from April 1 to July 18, 1961, in willfully failing to apprehend and report airmen under his supervision who, with his knowledge, were black-marketing Exchange merchandise. (Specification 9 of Charge II).

b. Again in paraphrased parlance plaintiff was found not guilty of the following Specifications:

(1) Purchasing six transistor radios from the Air Force Exchange in excess of reasonable amounts on May 18, 1961. (Specification 1 of Charge II).

(2) Selling or transferring, in conjunction with Airman Shields, 64 cartons of cigarettes, 12 boxes of cigars, and eight bottles of gin (all from the Air Force Exchange) to unauthorized persons on July 14 and 15, 1961. (Specifications 5 and 6 of Charge II).

(3) Selling, in conjunction with Airman Hughes, two cartons of Air Force Exchange cigarettes to one Cox, on April 1, 1961. (Specification 8 of Charge II).

c. All of the foregoing Charges and Specifications rested (as expressly alleged in the Specifications themselves) on violations of various subparagraphs of paragraph 51.1, United States Air Forces in Europe Supplement 1 to Air Force Regulation 147–14, dated November 15, 1960, except that pertaining to the sale of gin (Charge II, Specification 6, of which plaintiff was found not guilty), which was alleged to violate paragraph 14a, United States Air Forces in Europe Regulation 176–1, dated April 22, 1960. The regulations were not physically in evidence, but presumably the court-martial took judicial notice of them. They were set forth on pages 1–3 of Defendant's Exhibit 1, a copy of the Advice of the Staff Judge Advocate, Third Air Force, to the General Court-Martial assigned to plantiff's case, under date of January 18, 1962.

d. On February 2, 1962, plaintiff was sentenced by the court to reduction in rank to Airman Basic, forfeiture of $55 per month for six months, and confinement at hard labor for six months. On April 23, 1962, the sentence was approved by the convening authority with a modification reducing the forfeiture of pay to $43 per month for six

months. The maximum possible sentence if plaintiff had been found guilty on all charges would have been dishonorable discharge, forfeiture of all pay and allowances, reduction to grade of Airman Basic, and confinement at hard labor for 16 years and 3 months.

c. Plaintiff remained in the Air Force after serving his sentence and was, at the time of filing his petition, a technical sergeant.

10. Testimony generally. The prosecution produced as witnesses in its case in chief Airmen Hughes, Shields and Squire, Captain Miller, and three female British civilian employees of the Air Force Exchange (Morley, Fletcher and Coleman). In rebuttal the defendant called the wife of Airman Hughes. The accused (plaintiff here) produced as fact witnesses, besides himself and his wife, six enlisted men, and as character witnesses seven ranking noncommissioned officers.

11. Veracity, character, and motives of Airman Hughes.

a. Hughes was court-martialed and convicted November 2, 1961, for black-market activities. He was also convicted of black-market activities by a British court for violations of British customs laws. He had trafficked in black-marketing activities for three years, by his own admission. Hughes admitted that his testimony at plaintiff's court-martial conflicted with and was almost a complete denial of his testimony at his own court-martial, and admitted that he lied (but not under oath) to OSI agents interrogating him in preparation for his own court-martial. Hughes testified that plaintiff had attempted to get him to testify falsely, which plaintiff denied. Hughes denied to the OSI agents any knowledge of black-marketing activities, contrary to his testimony at plaintiff's court-martial. He testified that he had gone to Scotland with plaintiff in June 1961 on a black-marketing mission, although he had testified at his own trial that it was in May 1961, a discrepancy he attributed to poor memory. Hughes said he lied deliberately at his own court-martial at the instance of his British counsel, who wrote out what he was to say and did not ask Hughes whether he was guilty. Whereas Hughes had told OSI investigators that plaintiff had given him the telephone number of a black-

market outlet at Southend, he testified in plaintiff's trial that Airman Wainwright had given the telephone number to him and plaintiff. Hughes admitted having obtained a number of ration cards illegally from a Sergeant Sliwerski. Sergeant Klein testified that Hughes had bragged to him that he had made enough in the black market to pay for a $20,000 home and put $15,000 in the bank. Hughes admitted that he had received property from Airman Shields which he thought to be stolen, consisting of tools and a tool box which Hughes shipped home, after giving some tools to plaintiff (he said). In testifying that he was with plaintiff when they bought a number of transistor radios from the Air Force Exchange for illegal sale on the black-market, Hughes said that he had not mentioned this transaction previously because it had just occurred to him since his own court-martial. Sergeant Klein testified that, on January 8, 1962, Hughes told him that he had testified before plaintiff's Article 32 Investigation Board, and that "They're trying to put me in a trick, but they'll never do it because I'll lie my way out of it." Captain Miller, Hughes' commanding officer, said he would believe Hughes' testimony under oath.

b. In November 1961, testified Airman Jones (who was convicted of black-marketing in a British court), Hughes told him that Sergeant Collier and Captain Miller, plaintiff's commanding officer, had threatened that if he (Hughes) did not make a statement against plaintiff he would get a five-year prison term and a dishonorable discharge, so he had complied and had given a statement which was untruthful in part. To the contrary, Hughes testified that he had been promised nothing in exchange for accusing plaintiff. However, in serving his court-martial sentence of six months at hard labor he was given office work, passes, and permission to watch television and attend movies with his wife, concessions not usually accorded prisoners. (See paragraph 6 of the January 18, 1962, Advice of the Staff Judge Advocate to the Trial Counsel which describes the lenient treatment accorded Hughes in confinement. This was not before the court-martial, but it was necessarily known to Trial Counsel at the time.) On July 14, 1961, testified Staff Sergeant Klein, Hughes told him that he had cleaned up on the black market, and that "if this thing ever breaks, I'll drop a lot

of people in the soup." Plaintiff testified that on July 18, 1961, Hughes told him that Captain Miller was selling whiskey through a first sergeant. When plaintiff told him he would have to prove it or go see Captain Miller about it, Hughes became white in the face.

12. Black-market sale to Cox. Hughes testified that in early April 1961 he had sold for plaintiff, as a favor and without compensation, certain alcoholic beverages and cigarettes to one Cox, a British civilian, and turned over the proceeds to plaintiff. Plaintiff denied this. These facts related to Specification 4 of Charge II, of which plaintiff was found not guilty.

13. First trip to Southend. Hughes testified that on or about the evening of June 9, 1961, he and plaintiff drove in Hughes' car to Southend, England, with 140 boxes of cigars placed on or under the back seat, sold them to an unknown purchaser for $2 per box, divided the money between them, and returned home.[1] At his own court-martial trial on November 2, 1961, and in a written statement he had given Captain Miller, Hughes had said the trip in question was in May 1961, an error which he attributed to a lapse of memory. In his testimony plaintiff denied the facts stated by Hughes, and said that he had taken only one trip to Southend, which was in June 1961 as related in finding 14, *supra*. Specification 1 of Charge I and Specifications 2 and 3 of Charge II in the case against plaintiff are the only Specifications relating to an offense involving 140 boxes of cigars allegedly committed jointly by Hughes and plaintiff, while Hughes testified as to two black-marketing trips to Southend with plaintiff, each trip allegedly involving the transportation to, and sale of 140 boxes of cigars in, Southend. It is fair to assume that the Specifications refer to only one trip to Southend, and that therefore any testimony by Hughes concerning the earlier of the two alleged trips was not the subject of any specific charges and so was not included in the Specifications of which plaintiff was found guilty. In his testimony plaintiff denied knowledge of the earlier trip to

[1] In affidavits attached to the plaintiff's Correction Board application, Airman [illegible] and Jones aver that plaintiff was on duty the night of June 9, 1961, thus placing him elsewhere than Southend. These affidavits were before the Correction Board but not before the court-martial.

Southend to which Hughes had testified, and there was no evidence of the first trip corroborating Hughes' account of it.

14. Second trip to Southend. The sharpest conflict in the entire court-martial trial, and the crux of plaintiff's conviction, concerned a trip to Southend on June 17, 1961, by Hughes and his wife and two dogs in their car, jointly with plaintiff, his wife, their four children and Master Sergeant Herron in plaintiff's car. The issue is whether plaintiff transported in his car 140 boxes of cigars and 20 transistor radios to Southend on this occasion and, with Hughes, sold them to an unnamed British civilian and divided the proceeds. Hughes and his wife testified that this occurred, and plaintiff's testimony that it did not is supported by the testimony of his wife and Sergeant Herron. Sergeant Herron, who was flown to England from his station in Texas for the sole purpose of testifying in plaintiff's behalf at the trial, stated that no cigars or transistor radios were in plaintiff's car (including the trunk which he had occasion to inspect) at any time during the course of the trip to Southend, and at no time did plaintiff (who was in his presence throughout the trip) engage in the sale of such merchandise to others. Plaintiff and his wife testified and described the trip in detail, denying that plaintiff transported or sold the merchandise as stated by Hughes. Mrs. Hughes testified concerning the trip to Southend, but she had no personal knowledge corroborating Hughes' testimony that plaintiff transported merchandise to Southend and sold it there in conjunction with Hughes to a British civilian. Mrs. Hughes did testify that Hughes, plaintiff, and Sergeant Herron absented themselves for more than half an hour at Southend from their wives and the children, that the Juhl car was gone and that when they returned the plaintiff had some British money (how much she did not know) and gave some money to his wife. Contrary to the Law Officer's directions, Hughes coached Mrs. Hughes about her testimony, the morning she took the stand. The facts concerning the trip to Southend as related by Hughes constituted the necessary basis of Specification 1 of Charge I and Specifications 2 and 3 of Charge II of which plaintiff was found guilty by the court-martial. The testimony of Hughes, an alleged accomplice of plaintiff, was the sole evidence upon which plaintiff was convicted of the stated

Specifications, and Hughes' testimony was not corroborated.

15. Trip to Airman Squire's home in Brandon. Hughes testified that on some date between July 14 and 17, 1961, he and plaintiff drove to Airman Squire's home in Brandon in a car borrowed from Airman Baldadian, taking with them 62 boxes of cigars obtained by them from the Air Force Exchange, of which 28 boxes belonged to Hughes and the balance to plaintiff. In plaintiff's Article 32b investigation hearing on December 18, 1961, Hughes testified that the cigars were definitely on the back seat of the car, while at plaintiff's trial Squire testified they were in the trunk compartment. Hughes said that Squire was to sell the cigars for them, and that upon arriving at Squire's home he and Squire unloaded the cigars from the car and stored them in Squire's home while plaintiff kept watch for them. Squire testified that, pursuant to arrangements made with Hughes but not with plaintiff, Hughes brought 50 boxes of cigars to his house for him to sell. Plaintiff (said Squire) accompanied Hughes, but while Squire and Hughes unloaded the cigars from the car to the house, plaintiff remained in the yard talking with Mrs. Squire, from which point he could see neither the unloading operation nor the road. Squire said that plaintiff's name was not mentioned with respect to the deal with Hughes, that plaintiff was not serving as a lookout during the unloading procedures, and that he had no arrangements whatsoever to share the sale proceeds with plaintiff (as he did with Hughes). Squire said that he later threw the boxes of cigars away when he became apprehensive over being caught with them in the course of the investigation being conducted. In his testimony on this subject the plaintiff admitted visiting Squire's home accompanied by Hughes, but denied any knowledge of transporting cigars or cigarettes to Squire. Airman Baldadian, who was convicted of black-marketing by a British court on January 8, 1962, testified that he had never loaned his car to Hughes except sometimes at lunch, and that he did not lend his car to Hughes on the date or dates when Hughes testified he had borrowed it to drive to Squire's home, but left some question as to whether he might not have done so. The charges involving the transportation of 50 boxes of cigars to Squire's home are contained in Specification 7 of

Charge II, of which Specification plaintiff was found guilty by the court-martial. His guilt necessarily depended for its sole support on the testimony of Hughes, an alleged accomplice, whose testimony was denied by plaintiff and was not corroborated.

16. Joint sales by Airman Shields and plaintiff. Specifications 5 and 6 of Charge II allege a sale by Airman Shields and plaintiff on July 15, 1961, of 64 cartons of cigarettes and 12 boxes of cigars to an unauthorized person, and the transfer by them on July 14, 1961, of eight bottles of gin to an unauthorized person. As in the case of Specification 1 of Charge I and Specifications 2 and 3 of Charge II, involving the alleged possession by plaintiff in unreasonable amounts and sale by him and Hughes to an unauthorized person at Southend of 140 boxes of cigars obtained from the Air Force Exchange, the evidence of plaintiff's guilt (under Specifications 5 and 6 of Charge II) consisted solely of the uncorroborated testimony of an alleged accomplice (in this instance, Airman Shields) of tarnished character and a self-admitted liar except that the plaintiff was found not guilty as to Specifications 5 and 6 of Charge II, while he was found guilty as to Specification 1 of Charge I and Specifications 2 and 3 of Charge II. In view of the acquittal of plaintiff under Specifications 5 and 6 of Charge II, it is not necessary to analyze the evidence adduced at the court-martial in support of the Specifications.

17. Irregular acquisition of cigars and cigarettes.

a. Specification 4 of Charge II accused plaintiff of wrongfully acquiring cigars and cigarettes from the Air Force Exchange in an irregular manner. The evidence as to this charge at the court-martial trial consisted of the testimony of Airmen Hughes and Shields, and that of three discharged female employees of the Air Force Exchange at Lakenheath (Morley, Fletcher, and Coleman), countered by the testimony of plaintiff and his wife.

b. Airman Hughes testified that in April or May 1961 he introduced plaintiff (denied by plaintiff) to Miss Morley, then a British employee of the Exchange, for the purpose of permitting plaintiff to purchase cigarettes without a ration card. Ration cards were issued to authorized personnel at the base permitting them to purchase limited quantities of

tobacco items, liquor, and certain other merchandise. Hughes stated that, from the end of April to sometime in July 1961 he and plaintiff went to the Exchange about three times a week to purchase items, mostly cigars, of which they would purchase from one to ten boxes at a time. They would go there about 8:00 to 8:30 in the afternoon, when Miss Morley would relieve the regular employee at the tobacco counter. Airman Shields testified that he visited the Exchange with Hughes and plaintiff on one occasion, personally purchased four cartons of cigarettes above his ration allowance by having his ration card overpunched (i.e., a punch hole overlapping a previous punch hole for the same allotment period), then went to a waiting car, where plaintiff handed him two or three boxes of cigars which he placed on the back seat. He did not testify that he had observed plaintiff purchase the cigars, or that the cigars purchased by plaintiff were in excess of his ration allowance or were purchased without a ration card, or that plaintiff had observed Shields or Hughes make their purchases without or in excess of their ration cards.

c. Miss Morley was an employee of the Air Force Exchange, and at tea breaks served as relief saleesclerk at the tobacco counter. Under date of July 18, 1961, she signed a written statement at the urging of a British constable in which she referred to sales of cigars and cigarettes to several airmen, including plaintiff, which statement she testified was not completely true and that it was signed by her under the implied threat that she would lose her job if she did not make it. She lost her job anyway. While the statement was attached to the court-martial record marked for identification as Prosecution Exhibit 1, it was neither offered in evidence by the Trial Counsel nor admitted in evidence by the court. It therefore has no standing as part of the evidence against plaintiff. Miss Morley testified that she had never sold tobacco items to plaintiff in any unusually large quantities. She did sell tobacco products at times to plaintiff on ration cards issued to his wife or his friends, but it was (she said) a usual practice for authorized persons to buy tobacco rations for their authorized friends by presenting their friends' cards. Plaintiff and his wife together were allowed ten cartons of cigarettes at a time (said Miss Mor-

ley), and once or twice plaintiff purchased eight cartons. She never sold tobacco products to plaintiff without punching his ration card or those of his wife or friends in such cases.

d. Mrs. Fletcher was an employee of the Air Force Exchange at Lakenheath assigned as saleesclerk to the tobacco counter. Under date of July 18, 1961, she signed a written statement at the instance of a British constable in which she referred to sales of tobacco products to airmen, including plaintiff, which statement she testified was signed by her under the threat that she would lose her job if she refused. She lost her job anyway. While the statement was attached to the court-martial record marked for identification as Prosecution Exhibit 3, it was neither offered in evidence by Trial Counsel nor admitted in evidence by the court. It therefore has no standing as part of the evidence against plaintiff. Mrs. Fletcher testified that plaintiff purchased cigarettes for himself and his wife, but never more than their combined ration allowance. Occasionally plaintiff would purchase cigarettes for friends on their ration cards, which was a common practice. She never sold cigarettes to plaintiff without punching his ration card, nor overpunched ration cards to allow persons to buy in excess of their ration allowance. She sold large quantities of cigarettes to Airman Hughes, but not to plaintiff.

e. Mrs. Coleman (formerly Mrs. Lock), was a British employee of the Air Force Exchange at Lakenheath, where she was supervisory saleesclerk at the radio and record shop. Her testimony related exclusively to the sale of transistor radios to plaintiff. The only charge against plaintiff involving transistor radios was Specification 1 of Charge II, of which plaintiff was found not guilty. Specification 4 of Charge II accuses plaintiff of wrongfully acquiring cartons of cigarettes and boxes of cigars from the Exchange in an irregular manner, but does not refer to the acquisition of transistor radios. Thus the testimony of Mrs. Coleman is not relevant to any charges of which plaintiff was found guilty.

f. In summary, the sole evidence of plaintiff's guilt of purchasing cigars and cigarettes *for himself* under Specification 4 of Charge II was the testimony of Airman Hughes,

whose testimony if true established plaintiff as his accomplice in violation of Air Force regulations governing the acquisition of rationed items from the Air Force Exchange. The testimony of Hughes in this connection was not corroborated. That of Airman Shields established only that on one occasion plaintiff had handed him two or three boxes of cigars, without further direct evidence as to how he acquired them or whether that quantity was within his ration allowance. Shields' testimony was not corroborated, and did not serve to corroborate Hughes' testimony on the relevant charge, nor Hughes his. The testimony of Miss Morley and Mrs. Fletcher denied that plaintiff had purchased tobacco items in excess of his ration card allowances for himself or those authorized persons for whom he bought them using their ration cards, but did establish that at most plaintiff purchased cigarettes and cigars for his friends as an accommodation to them, using their ration cards; and that this was a common, accepted practice. The testimony of Mrs. Coleman related to plaintiff's purchase of radios, and was completely irrelevant to the issue raised by Specification 4 of Charge II. Whether the applicable regulation prohibited plaintiff from purchasing rationed items from the Exchange for his authorized friends, using their ration cards and as an accommodation to them, depends on construction. The regulation was not physically before the court-martial but presumably judicial notice was taken of it. It appears on pages 2 and 3 of the January 18, 1962, Advice of the Staff Judge Advocate to Trial Counsel, and is in evidence as Defendant's Exhibit 1.

18. Plaintiff's dereliction of duty.

a. General. The sole remaining charge of which plaintiff was found guilty was Specification 9 of Charge II, alleging plaintiff's dereliction of duty from April 1 to July 18, 1961, in knowing that Air Policemen under his supervision were engaged in black-marketing activities and willfully failing to apprehend them or to report the violators to his superior officers pursuant to his duty. Plaintiff's conviction under this Specification necessarily depended exclusively on the testimony of Captain Kenton D. Miller, and Airmen Hughes and Shields, for no other prosecution witnesses testified in support of the Specification, no documentary evidence sup-

porting the Specification was admitted in evidence at the court-martial trial, and the testimony of plaintiff and his witnesses refuted the accusations in the Specification. It thus becomes necessary to analyze the testimony of Captain Miller and Airmen Hughes and Shields with respect to the Specification, as well as to cite from the record facts as to their credibility, veracity, character, and motivation.

b. **Captain Miller.** Captain Miller had been plaintiff's commanding officer in England for two years preceding the court-martial trial and was a close associate who held a high regard for plaintiff's ability, honesty, etc., until events starting in July 1961 caused him to change his mind. Early in July 1961 the OSI brought to his attention that about 49 enlisted men in his command were engaged in black-marketing activities, ten of them being under plaintiff's supervision. On or about July 18, 1961, Hughes orally informed Captain Miller of 29 men in the squadron whom he accused of black-market activities, including the plaintiff. Captain Miller interviewed about 60 men in the squadron, of whom only Airmen Hughes, Shields and Squire implicated plaintiff in black-marketing activities. Some others whom Captain Miller interviewed had suspicions of plaintiff, but no proof. This was the extent of Captain Miller's knowledge, all of it being hearsay based on statements to him by Airman Hughes, Shields and Squire. Squire testified at the trial but said nothing inculpating the plaintiff. Miller had, except for this hearsay, no information to show plaintiff had any guilty knowledge and the case therefore depends again on the testimony of the alleged accomplices only.

c. **Airman Hughes.** The testimony by Hughes at plaintiff's court-martial, relating to this specification, was substantially that already discussed, and its infirmity is the same as with respect to other specifications.

d. **Airman Shields.**

(1) **Veracity and character.** Shields admitted he had lied in his statements to OSI investigators, as to the amount of black market purchase money he received. He had testified at his own Article 32b investigation that he had *bought* eight bottles of gin from plaintiff to sell on the black-market, but at plaintiff's trial he said that he had sold the gin for plaintiff on the black-market and paid the plaintiff later. This

transaction is one which figured in Specification 6 of Charge II in plaintiff's court-martial, of which Specification plaintiff was found not guilty. Shields told the OSI investigators that plaintiff had given him a telephone number of a prospective purchaser of black-market merchandise in Southend, which plaintiff denied in his testimony. Sergeant Bryant testified that in the summer of 1961 Shields told him that "If I go to Molesworth [1] there will be a bunch going with me, including you." When Bryant replied that he had done nothing, Shields (per Bryant) replied: "No, but I'll think of something to tell them when I go down there.", and "I'll tell them anything to put anybody in a trick if it will get me out of it myself." Bryant also testified that Shields told him in November 1961 that he had gotten off with an Article 15 (two weeks extra duty and verbal reprimand) and, as to plaintiff: "After the b—— s—— I told those people, they've got enough to hang Juhl." Bryant reported this conversation to plaintiff. Shields denied that he told Bryant that he would tell anything on anybody to get out of it himself. Plaintiff testified that Shields told him on August 10, 1961, that he had made a false statement implicating plaintiff in black-marketing activities, and said "Here I am, one of the biggest floggers on the base, or was one. And I really dropped you in the you-know-what." Plaintiff also testified that on this occasion Shields told him that he had gotten off with a light punishment (Article 15) in exchange for making a statement against plaintiff, and that "Your name ain't worth a damn on this base any more. You used to have a pretty good position. I told enough b—— s—— on you to put you—hang you." When plaintiff asked Shields whether he had been instructed by the legal office not to talk to him about the case, Shields is reported to have replied: "P—— on the legal office. I'll talk to anybody I want to." Shields admitted that he might have said to plaintiff, after getting a light punishment, that he had taken the easy way out and had made a statement implicating plaintiff in which "I really dropped you in the s——", but does not remember having told plaintiff that he made the statement implicating plaintiff

[1] Consolidated Confinement Center at RAF Station Molesworth, the standard site for serving sentences of confinement at hard labor.

in order to avoid a threatened long sentence, although he may have told plaintiff that it would be to his (Shield's) advantage to make such a statement. Airman Jones testified that in November 1961 Shields told him that he could tell more lies about plaintiff and be believed, because plaintiff's word did not mean anything on the base any longer. Jones also testified that Shields told him that, in spite of being the biggest black-marketer on the base, he had been given just a pat on the back and told he had been a naughty boy [figuratively speaking] by way of punishment (reprimand and two weeks extra duty), and that Captain Miller and Sergeant Collier had threatened him (Shields) with a six-month sentence and a bad conduct discharge if he did not make a statement against plaintiff. Hughes, who was a good friend of Shields, testified that he had received stolen property from Shields (cf. finding 11a *supra*). Shields denied that the OSI agent had threatened that his wife (apparently a foreign national) would not be allowed to accompany him to the United States if he refused to implicate plaintiff. Plaintiff testified that Shields was angry at him for his refusal to fix a traffic ticket, and this was corroborated by Airman Jones.

(2) As previously stated, Shields was the sole and uncorroborated witness against plaintiff in connection with Specifications 5 and 6 of Charge II (relating to an alleged sale by Shields and plaintiff on July 15, 1961, of cigars and cigarettes and the transfer by them on July 14, 1961, of eight bottles of gin to unauthorized persons), of which Specifications plaintiff was found not guilty. Shields' testimony in support of these alleged offenses had no relationship to any other Specifications of which the plaintiff was found guilty and did not corroborate any evidence of plaintiff's guilt as to such offenses. Moreover, Shields was not under plaintiff's direct supervision in the Squadron, which was one of the express elements of the offense charged insofar as plaintiff's knowledge of Shields' black-marketing activities is concerned. Shields was a purported accomplice.

(3) The testimony of Shields was "self-contradictory." The triers of fact must have found it improbable in view of their acquittal of plaintiff on the specifications, other than 9, in which Shields rather than Hughes was the purported

accomplice. Insofar as plaintiff's conviction on specification 9 rested on any transactions testified to by Shields, it was made on the uncorroborated testimony of a purported accomplice which was both "self-contradictory" and "improbable."

III—Correction Board

19. Application to Correction Board.

a. Under date of October 27, 1962, plaintiff filed an application with the Air Force Board for Correction of Military Records seeking a complete reversal of his court-martial sentence (and presumably his conviction). Plaintiff stated on the form application that he did not desire to have witnesses appear in person in support of the application. Attached to the application were, in addition to plaintiff's affidavit, the affidavits of eighteen persons having direct or indirect knowledge of the facts, and the unsworn statements of two other such persons. If the contents of the affidavits are true, they are incompatible with plaintiff's guilt of the charges of which he was convicted, and shed particular light on the veracity and motivation of Hughes, the chief prosecution witness without whose testimony plaintiff could not have been convicted. They would justify close scrutiny by the Correction Board of the court-martial proceeding.

b. On March 5, 1963, the Director of Military Justice of the Office of The Judge Advocate General recommended to the Correction Board that the relief sought by plaintiff be denied because he had failed to establish the asserted errors and injustice. In its one and one-third pages the letter does not discuss the evidence or the law, but primarily rejects the affidavits accompanying plaintiff's application as being "executed by persons who were either directly or indirectly interested in the outcome of the trial." This generalization is without basis in many instances, as the affidavits themselves reveal.

c. On September 17, 1963, the Correction Board sent the plaintiff the following form letter rejecting his claim:

> Reference is made to your request for correction of your military records under the provisions of Section 1552, Title 10, United States Code (70A Stat 116).
>
> The administrative regulations and procedures established by the Secretary of the Air Force for the

guidance of the Board provides that an application may be denied where the applicant has not submitted sufficient evidence to establish a showing of probable error or injustice in the case.

I regret to advise you that a careful consideration by the Board of your military record, together with such facts as have been presented by you, fails to establish a showing of probable error or injustice in your case. Therefore, in the absence of additional material evidence tending to show the commission of an error or injustice, no further action on your application is contemplated.

d. Plaintiff, through a staff attorney of the American Legion, applied to the Correction Board for a reconsideration on December 3, 1964. On December 14, 1964, the Correction Board sent the following letter to plaintiff's counsel rejecting his request:

As requested in your letter of December 3, 1964, the Board has again reviewed the case of Kenneth N. Juhl, AF 693 2438.

After careful consideration, the Board determined that a change in the prior decision or a formal hearing is not warranted.

e. The foregoing constitutes the entire Correction Board record furnished the court. It is presumed to be complete. It does not contain a report by a Correction Board examiner advising the Correction Board as to the factual and legal aspects of the claim and making recommendations for its disposition, and it is assumed that no such report was prepared. At pretrial conference on March 30, 1966, the parties stipulated that the Correction Board considered Defendant's Exhibits 1 and 2, which are respectively (1) the Advice of Staff Judge Advocate to Trial Counsel dated January 18, 1962, and (2) a 68-page transcript of testimony taken in connection with the Article 32b investigation of plaintiff as referred to in finding 6, *supra*. It cannot be determined how much, if any, consideration the Correction Board gave to the contents of Defendant's Exhibits 1 and 2 described above. There is no stipulation or clear indication that the Correction Board considered or had physical possession of Joint Exhibits 1 and 3, which are, respectively, (1) a 64-page extract from the record of court-martial proceedings before and after the trial itself, and (3) the court-martial trial transcript of over 500 pages, including testimony, arguments,

instructions, and exhibits, both exhibits being vital to any bona fide review of plaintiff's claims. What consideration the Correction Board gave to Joint Exhibits 1 and 3, if any, is not known, since the only clue is the statement in the Board's form letter to plaintiff (paragraph c of this finding) that it had given "careful consideration" to plaintiff's military record. It is not indicated that any effort was made by the Board to communicate with the individuals whose affidavits were attached to plaintiff's application.

f. As stated in the preceding paragraph, one of the court-martial documents which was available to the Correction Board for its consideration was the 68-page transcript of testimony in the Article 32b investigation of plaintiff as a preliminary to his court-martial. Attached to this transcript as "Article 32 Exhibit 2" was a photostatic copy of an Air Force Exchange Ration Card issued to plaintiff covering the period July through December 1961. The original of this ration card was taken from the plaintiff at the time of his arrest on July 18, 1961. The copy of the ration card appears to have been overpunched (i.e., more than one overlapping punchmark in each of four tobacco allotment periods during July 1961), giving rise to the inference at the Article 32b investigation that plaintiff had purchased more tobacco than he was authorized to have. This exhibit was deliberately not offered by the prosecution at the plaintiff's court-martial trial because Trial Counsel felt it would not be admissible due to the illegal circumstances of its acquisition by the OSI. Since the transcript of testimony of the Article 32b proceeding, together with the ration card and considerable testimony thereon, was stipulated to have been considered by the Correction Board, but had not been offered to the court-martial because of the prospective objections to its admissibility, the plaintiff contends here that the Correction Board's consideration of such illegally procured and tainted evidence deprives plaintiff of his constitutional rights. To offset the possible prejudice inherent in the document, the parties stipulated that if the plaintiff were to testify he would say that some of the punchers used at the Air Force Exchange on ration cards were old and frequently would not cut clean, making it necessary for the clerk to overpunch to get the paper out of the hole, as evidenced by Plaintiff's

Exhibit 2 containing a ration card issued to plaintiff for the period January through June 1962, showing samples of incomplete actual punches for tobacco allotment purchases in June 1962, a period while plaintiff was still in confinement.

Conclusion of Law

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover on his claim and judgment is entered to that effect, with the determination of the amount of recovery to be reserved for further proceedings under Rule 47(c).

Exhibit "A"

158. Credibility of Witnesses; Impeachment of Witnesses.—*a.* Credibility of Witnesses.—The credibility of a witness is his worthiness of belief, and may be determined by the acuteness of his powers of observation, the accuracy and retentiveness of his memory, his general manner in giving evidence, his relation to the matter in issue, his appearance and deportment, his friendships and prejudices, and his character as to truth and veracity, by comparison of his testimony with other statements made by him and with the testimony of others, and by other evidence bearing upon his veracity. See in this connection 149*b*(1) (Cross-examination).

The court may ordinarily draw its own conclusions as to the credibility of a witness and attach such weight to his evidence as his credibility may warrant. However, there are cases in which the court would be justified in attaching no weight at all to the testimony of a witness, or in which the court would not be warranted in accepting certain testimony as sufficient to establish the guilt of an accused. For example, a conviction cannot be sustained solely on the self-contradictory testimony of a particular witness, even though motive to commit the offense is shown, if the contradiction is not adequately explained by the witness in his testimony. Also a conviction cannot be based upon the uncorroborated testimony of an alleged victim in a trial for a sexual offense, or upon the uncorroborated testimony of a purported ac-

complice in any case, if such testimony is self-contradictory, uncertain, or improbable. The uncorroborated testimony of an accomplice, even though apparently credible, is of doubtful integrity and is to be considered with great caution.

In general, a person gains no corroboration merely because he repeats a statement a number of times. Hence, a witness ordinarily may not be corroborated by showing that he made statements consistent with his testimony. But this is only a general rule, and there are some situations in which such statements, having a real evidential value, are admissible. If the testimony of a witness has been attacked on the ground that it was due to an influence created by a matter which came into existence after the happening of the event to which such testimony relates, evidence of his statements or conduct, consistent with his testimony, made or occurring before the creation of that influence should ordinarily be received. For example, if a witness is impeached on the ground of bias due to a quarrel with the accused, the fact that before the date of the quarrel he made an assertion similar to his present testimony tends to show that his present testimony is not due to bias. If his impeachment is sought on the ground of collusion or corruption, consistent statements made prior to the imputed or admitted collusion or corruption may have such evidential value as to make them admissible, and if his testimony is attacked on the ground that he made an inconsistent statement or on the ground that such testimony was a fabrication of recent date, evidence that he had made a consistent statement before there was a motive to misrepresent, and before any imputed or admitted inconsistent statement, may be received.

If a witness testifies as to the identity of the accused as the person who committed, or did not commit, the offense in question, such testimony may be corroborated, even though the credibility of the witness has not been directly attacked, by showing that the witness made a similar identification with respect to the accused on a previous occasion. In such a case the identifying witness himself and any person who has observed the previous identification may testify concerning it. See as to corroboration of the victim in sexual offenses, 142c (Fresh complaint). See also 139b (Illustrations of hearsay rule).

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